



**REPUBLIC OF KENYA**  
**IN THE HIGH OF KENYA AT KERUGOYA**  
**SUCCESSION CAUSE NO. 35 OF 2013**  
**IN THE MATTER OF THE ESTATE OF KIRIUNGI KARANI.....DCD**

**PERIS WANJIRA KINYUA.....APPLICANT**

**V E R S U S**

**EPHANTUS KARANI MAKANGA..... RESPONDENT**

**JUDGMENT**

1. This matter relates to the estate of Kiriungi Karani who died intestate on 12/5/2004. A grant of Letters of Administration was issued to Ephantus Karani Makanga on 7/2/2007 who later on 2/8/2007 filed summons for Confirmation of grant.
2. An affidavit of protest was filed by Bether Kuthana Cyrus, Peris Wanjira Kinyua and Francis Muriithi Makanga.
3. This court, Justice Limo, on 7/7/2015 directed that the protest be heard by way of oral evidence. When the matter came up for hearing on 16/8/2016 the court was informed that all the beneficiaries had agreed that the estate be shared equally among all the six beneficiaries. However one of the protestors Francis Muriithi Mukanga was not agreeable to the proposed mode of distribution and opted to proceed with the protest.
4. At the close of the protest, Purity Muthoni who is a child of one the daughters of the deceased applied for time to file affidavit alleging that she was not informed when the cause was filed. She subsequently filed an affidavit and deposes that her mother Meli Wambui Kariuki was a daughter of the deceased and they should be given her share. She deposes that they are nine siblings.
5. Peris Wanjira filed an application dated 20/9/2017 seeking an order that the grant be confirmed as the beneficiaries have reached a consensus. The application was allowed as there was no objection. What is before this court is the determination of the protest by Francis Muriithi Makanga.
6. The issues raised by the protestors are as follows:-

**7. 1<sup>st</sup> Protestor**

The protestor Bether Kuthana Cyrus stated that the deceased was the registered owner of **Ngariama/Nyangeni/195** and had sub-divided the land and assigned each his/her portion which they are cultivating. However, the sub-division was not registered. That the petitioner had been given 7 acres by the deceased in addition to 1 acre out of **Ngariama/Nyangeni/195**. That instead of giving the daughters 0.25 acres each, he has given them 0.10 acres while Francis Mutiithi Makanga and himself 2.75 acres each.

**8. 2<sup>nd</sup> Protestor**

The protestor Peris Wanjira Kinyua stated that the deceased estate comprised of **Ngariama/Nyangeni/195** measuring 6.9 acres and he left behind 6 children. That the petitioner proposes to get 2.75 acres and give the three daughters 0.25 acres each which is unfair since he has 15 acres of land in Mwea. In addition their elder brother also called Karani Makanga has 7 acres of his own.

She proposed that each of the dependants to get approximately 1 acre each.

**9. 3<sup>rd</sup> Protestor**

The protestor Francis Mutiithi Makanga stated that the petitioner was awarded the following Parcels of Land;

- **Ngariama/Nyangeni/195** one acre vide **Arbitration Case No. 29 of 2017** between the deceased and himself.
- **Mwea/Ngucwi/176 and 325** by their clan through assistance of the deceased since he was a minor at the time.

He therefore proposed that the estate be distributed as follows;

- a) Ephantus Karani Makanga – 0.40 Ha**
- b) Francis Mutiithi Makanga – 1.6 Ha**
- c) Kiriungi Karani – 0.4 Ha (he bequeathed to Francis Mutiithi Makanga)**
- d) Philis Wanjira Kinyua, Evangeline M. Kabiro & Betha Kuthaiya Kinyua – 0.2 Ha jointly**

#### **10. Petitioner**

In his affidavit in support of summons for confirmation of grant, he proposed that the deceased's estate be distributed as follows;

- a) Ephantus Karani Makanga – 2.75 acres**
- b) Francis Mutiithi Makanga – 2.75 acres**
- c) Phares Karani Makanga – 0.25 acres**
- d) Philis Wanjira Kinyua – 0.25 acres**
- e) Evangeline M. Kabiro – 0.25 acres**
- f) Betha Kuthaiya Kinyua – 0.25 acres**

11. On 22/09/2014, the dependants Evangeline Muthoni Kabiro, Betha Kuthaiya Kinyua, Phylis Wanjira Kinyua and Karani Makanga filed consent agreeing to the mode of distribution by the administrator and the petitioner be substituted in letters of administration by Phylis Wanjira Kinyua.

12. The parties have now confirmed that the deceased was survived by the following dependants

- a) Ephantus Karani Makanga – son**
- b) Francis Mutiithi Makanga – son**
- c) Phares Karani Makanga – son**
- d) Philis Wanjira Kinyua – daughter**
- e) Evangeline M. Kabiro – daughter**
- f) Betha Kuthaiya Kinyua – daughter**
- g) Meli Wambui Kariuki – daughter (deceased).**

13. The estate of the deceased is comprised in Land parcel No. LR Ngariama/Nyangeni/195 measuring 2.5. Hactares. The beneficiaries who were listed on the affidavit in support of Letters of Administration are six that is to say:-

- i) Phares Karani Makanga – son**
- ii) Ephantus Karani Makanga – son.**
- iii) Philis Wanjira Kinyua – Daughter**
- iv) Evangeline M. Kabiro – Daughter.**
- v) Bertha Kathata Kinyua – Daughter.**

vi) *Francis Muriithi Makanga – Son.*

This is also confirmed by the Chief's letter dated 29/5/07. These are the rightful beneficiaries of the estate of the deceased. **Section 29 of the Law of Succession Act** defines dependant. It provides:-

**“For the purposes of this Part, “dependant” means**

**(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.”**

The dependants are supposed to share the estate equally unless the dependant consents to getting a smaller share than other beneficiaries. Section 38 of the Law of Succession Act provides:-

**“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 be equally divided among the surviving children.”**

Purity Muthoni Irimu is the child of Meli Wambui Kariuki who according to the death certificate annexed died on 19/06/98. This shows that she pre-deceased the deceased. Purity Muthoni and her siblings are grandchildren of the deceased. For them to be entitled to a share of the estate they must prove that they were being maintained by the deceased as provided by under Section 29(b) of the Act which states:-  
.....”**children whom the deceased had taken into his family as his own ..... as were being maintained by the deceased immediately prior to his death.”**

Section 38 provides that provision be made for the surviving child or children.

Meli Wambui was married. Purity Muthoni and her siblings do not live on the estate of the deceased. Based on these provisions, Purity and her siblings who are grandchildren of the deceased are not entitled to a share of the estate. Grandchildren are not entitled to the estate of their grandparents. My view is that Purity Muthoni and her siblings are not beneficiaries entitled to the estate of the deceased.

14. Francis Mukanga testified that the deceased had expressed his wish on how he wanted the land to be distributed. I find that these was not proved. The deceased died intestate. Section 34 Laws of Succession Act defines Intestacy. It provides:-

**“A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.”**

14. There is no prove that the deceased left any oral or written will. The deceased died intestate and the estate must be distributed as an intestate succession. Five of the beneficiaries consented to the distribution proposed by the petitioner. The consent cannot be upheld as one of the beneficiary filed a protest. The claim by the protestor cannot be sustained as there is no reason why he should get four acres and leave only one acre for the rest. That would not be a fair distribution.

15. My view is that since – Phares Karani Makanga.

- Philis Wanjira Kinyua

- Evageline M. Kabiro

- Betha Kuthaya Kinyua have consented to the proposal by the petitioner that they each get 0.25 of an acre, I have no reason to upset their wish. The proposal by the petitioner that him and Francis Muriithi Makanga get 2.75 acres is fair and is in accordance with the provision of the Act that the estate be distributed equally.

16. For these reasons I find that the protest by Francis Muriithi Makanga is without merits and is dismissed. I order that the grant be confirmed and the distribution be as proposed by the administrator.

That is to say:-

- **Ephantus Karani Makanga - 2.75 Acres.**

- **Francis Muriithi Makanga - 2.75 Acres.**

- **Phares Karani Makanga - 0.25 Acres.**

- Philis Wanjira Kinyua - 0.25 Acres.
- Evangeline M. Kabiro - 0.25 Acres.
- Betha Kuthata Kinyua - 0.25 Acres.

17. The claim by Purity Muthoni Irimu is without merits and is dismissed.

18. On costs since the parties are family members, I order that each party to bear its own costs.

**Dated at Kerugoya this 7<sup>th</sup> day of February 2019.**

**L. W. GITARI**

**JUDGE**