



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 856 OF 2013**

**IN THE MATTER OF THE ESTATE OF THIAKA BENJAMIN Alias THIAKA BENJAMEN ..... DECEASED**

**JOHN KARIUKI THYAKKAH..... PETITIONER**

**V E R S U S**

**JOHN NJIRU THIAKA..... PROTESTOR**

**JUDGMENT**

1. The petitioner John Kariuki Thyakkah applied for grant of letters of administration intestate of the estate of Thiaka Benjamin Njau alias Thiaka Benjamin Njau (deceased) which he was granted on 20/05/2015. They applied for confirmation of grant on 14/01/2016 and indicated that the deceased was survived by 12 children and 2 grandchildren.

2. He proposed that the deceased's estates be determined as follows;

1. **Kabare/Nyagati/4773** be shared equally by:

- i) Grace Wanjiku**
- ii) Janeffer Muthoni Gacoki**
- iii) Mary Wambui Thiaka**
- iv) Wacuka Thiaka**
- v) Gladys Micere Thiaka**
- vi) Dorcas Waithira Thiaka**
- vii) Grace Wanjiku Thiaka**
- viii) Joseph Murimi Ndege**
- ix) John Kariuki Thyakkah**
- x) David Omi Thiaka**

2. **Kabare/Nyagati/4775** be inherited by Julius Ndambiri Thiaka.

3. **Kabare/Nyagati/4776** be inherited by John Njiru Thiaka.

4. **Kabare/Nyagati/4777** be inherited by Wacuka Thiaka & Mary Wambui Thiaka.

5. **Kabare/Nyagati/4778** be inherited by James Nyaga Thiaka.

6. **Kabare/Nyagati/4779** be inherited by Joseph Njau Thiaka.

7. Leasehold interest in half share of **L.R Kabare/Nyagati/609/15** be registered in the name of John Kariuki Thyakkah as trustee for all the children of the deceased.

8. Proceeds in accounts: Equity Bank A/C [xxxx], Barclays Bank – Embu A/C [xxxx], and Postbank A/C [xxxx], to be paid out to John Kariuki Thyakkah to share equally among all the children of the deceased.

9. Barclays Bank shares A/C no. [xxxx] to be registered in the name of John Kariuki Thyakkah who will share the dividends equally between the children of the deceased.

### **3. Protestors' case**

The protestor John Njiru Thiaka proceeded to file an affidavit in protest on 08/02/2017. He stated that the deceased had two wives who are now deceased. The first wife had five children while the second had nine children. That during his lifetime, he had showed his 5 sons their respective portions each measuring 1 ½ acres and his wives were shown a portion of 2 acres. That he had a step-brother who was unmarried and was shown a portion of 1 ½ acre and the daughters were to share 4 acres with the daughters of each house getting 2 acres. That the petitioner has been collecting rent from tenants on Kimbimbi Plot No. **L.R Kabare/Nyagati/609/15**.

4. He proposed that the deceased's estate be shared as follows;

a) **Kabare/Nyagati/14773** be shared equally by:

i) **Grace Wanjiku**

ii) **Janeffer Muthoni Gacoki**

iii) **Joseph Murimi**

iv) **Mary Wambui**

v) **Gladys Micere**

vi) **Rahab Wacuka**

vii) **Dorcas Waithira**

viii) **David Omi Thiaka**

b) **Kabare/Nyagati/14775** be inherited by Julius Ndambiri Thiaka.

c) **Kabare/Nyagati/14776** be inherited by John Njiru Thiaka.

d) **Kabare/Nyagati/14777** be inherited by

i) **Grace Wanjiku**

ii) **Janeffer Muthoni Gacoki**

iii) **Joseph Murimi**

iv) **Mary Wambui**

v) **Gladys Micere**

vi) **Rahab Wacuka**

vii) **Dorcas Waithira**

viii) **David Omi Thiaka**

e) **Kabare/Nyagati/14778** be inherited by James Nyaga Thiaka.

f) **Kabare/Nyagati/14779** be inherited by Joseph Njau Thiaka.

g) **L.R Kabare/Nyagati/609/15** to be sold and proceeds shared equally by the thirteen children. The rent collected by petitioner for 5 years be taken into account while calculating the amount to be received.

h) Proceeds in accounts: Equity Bank A/C [xxxx], Barclays Bank – Embu A/C [xxxx], and Postbank A/C [xxxx], to be shared equally among all the thirteen children of the deceased. The money irregularly withdrawn by Dorcas Waithira's son Murimi to be taken into account while calculating the amount to be received by Dorcas Waithira.

i) Barclays Bank shares A/C no. [xxxx] to sold and the proceeds shared equally among the thirteen children equally between the children of the deceased.

j) Deceased's share in **Plot No. 15B Kimbimbi** to be sold and proceeds shared equally among the thirteen children equally.

k) Deceased's share in **Kutus Plot No. 47** to be sold and proceeds shared equally among the thirteen children equally. The amount collected by the petitioner to be taken into account while calculating his share

l) That the petitioner and Grace Wangeci should not get any land as they had been given as gift inter vivos their portions by the deceased.

## **5. Petitioners' case**

He agreed that the deceased had two wives but that they died before the deceased shared out his land therefore they could not have been shown portions of 2 acres as claimed. That the protestor omitted two children of the 2<sup>nd</sup> wife, Gladys Micere and Ben Njau. That the deceased had during his lifetime shown his 6 sons their respective parcels and not 5 sons as claimed and the protestor had omitted Ben Njau who was shown **Kabare/Nyagati/14777**. That the said Ben Njau who was unmarried passed away in 2010 and had indicated his parcel be inherited by Wacuka Thiaka and Mary Wambui Thiaka.

6. In addition, the protestor has omitted the petitioner and Grace Wanjiku whom he has referred to as Grace Wangeci. He confirmed the deceased had transferred to him **Kabare/Nyagati/14774** as his share but had not transferred any to Grace Wanjiku (Wangeci). That the deceased had sold 0.17 Ha to Wilson Thiaka Maingi husband to Grace Wanjiku.

7. That **Plot No. 47 Kutus** is part of their grandfather's estate of which he has no control. That the deceased had indicated none of his shares and plot be sold but that they be shared between all his 14 children. That among the proceeds is clearing a loan which the deceased had taken with Kirinyaga Trade Joint Board amounting to Kshs. 60,000/=.

## **Issues for determination**

### **1. Dependants of the deceased**

Both Petitioner and the protestor confirm that the deceased was survived by the following thirteen children, two of whom are deceased and survived by their sons;

- Grace Wanjiku
- Janeffer Muthoni
- Joseph Njau
- John Njiru
- John Kariuki Thyakkah
- Mary Wambui
- James Nyaga
- Justus Ndambiri
- Rahab Wacuka Thiaka
- Dorcas Waithira
- Gladys Wanjiku
- Wanjiru Thiaka – survived by David Omi Thiaka
- Judy Wanjiru – survived by Joseph Murimi.

8. However, Wacuka Thiaka is indicated by the protestor as Rahab Wacuka.

### **2. Distribution of the estate**

#### **Undisputed**

- **Kabare/Nyagati/4774** - petitioner
- **Kabare/Nyagati/4775** - Justus Ndambiri Thiaka
- **Kabare/Nyagati/4776** - John Njiru Thiaka
- **Kabare/Nyagati/4778** - James Nyaga Thiaka
- **Kabare/Nyagati/4779** - Joseph Njau Thiaka

## Disputed

- **Kabare/Nyangati/4773**
- **Kabare/Nyangati/4777** – belonged to Ben Njau son of the deceased but who passed away and had no child.
- **L.R Kabare/Nyangati/609/15.**
- **Proceeds in accounts: Equity Bank A/C [xxxx], Barclays Bank – Embu A/C [xxxx], and Postbank A/C [xxxx],.**
- **Barclays Bank shares A/C no. [xxxx],.**
- **Plot No. 15B Kimbimbi** – not mentioned by the petitioner.
- **Kutus Plot No. 47** – claimed to belong to grandfather's estate therefore until ownership is determined the same should not form part of the estate of the deceased.

9. As per the Court order given on 05/12/2017, the manager of Barclays Bank Embu was ordered to produce in court safe custody parcel number 156/5 which the petitioner believed contained the last will and testament of the deceased.

10. Upon perusal, the Will dated 01/02/1978 declares as follows;

**1. He bequeathed all his money at Barclays Bank International Kerugoya or any other Bank or cash at home to his wife Wathimu Thiaka.**

**2. All the rest, residue and remainder of his estate, he bequeathed to his wife Wathimu Thiaka if she survives him but if she predeceases him or if they should die as a result of common disaster or within 30 days of each other, then all the rest, residue and remainder of his estate shall be divided equally and pass to and vest in all his children and their heirs. This includes his automobiles.**

**3. He nominated his son John Kariuki Thiaka as executor of his last will and testament.**

11. I have considered the petition and the protest.

12. I find that there is no dispute on the distribution of land parcels No. 4774, 4775, 4776, 4778 and 4779 as I have listed above, the properties shall be distributed as proposed at Para 5B,C,D,E & F of the Petitioners affidavit in support of the Confirmation of Grant and the affidavit of protestor at Para 11 B,C,E,F, In respect of these properties by the petitioner.

13. The petitioner proposes that the proceeds in accounts at Equity Bank, Barclays Bank and Post Bank be shared equally. He also proposes that the shares of Barclays Bank be shared equally. The protestor has made the same proposal at Para 11 H & I of his affidavit of protest. There is therefore no dispute and the proceeds in the said accounts and the shares shall be distributed equally.

14. As for Plot No. Kabare/Nyangati/4773 petitioner has included Grace Wanjiku Thiaka and John Kariuki Thiaka who the protestor has omitted. The petitioner deposes that no land was transferred to Grace Wanjiku Thiaka (Grace Wangechi). The petitioner annexed documentary evidence which proves that the deceased had during his lifetime sold a portion of 0.17 Hectares to Wilson Thiaka Maingi the husband of Grace Wanjiku. As such Grace Wanjiku is entitled to a share of Kabare/Nyangati/4773 like the other daughters. The property will therefore be shared equally as proposed by the petitioner save that the name of the petitioner will be excluded.

15. With regard to Kabare/Nyangati/4777 it is conceded that the land had been bequeathed to Ben Njau who was unmarried and predeceased the deceased. It means it is property which rightly belonged to Ben Njau and he could give it out to those he wished. He had made his wishes known that the property should go to Wacuka Thiaka and Mary Wambui Thiaka. The property will be distributed to his two sister equally in accordance with his wishes. The property was not available for distribution to other beneficiaries as it had been given to Ben Njau by the deceased in his lifetime a fact which the protestor and Petitioner have acknowledged.

16. As regards leasehold interest in half share of LR Kabare/Nyangati/609/15 the petitioner proposes that he be registered in trust while the protestor proposes that it be sold and proceeds be shared equally. 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.”***

17. It proposes equal distribution to all the children.

18. In his last will the deceased stated as follow: - ***“-----the rest, residue and remainder of his estate shall be divided equally and pass on to and in all his children and their heirs -----“.***

19. The least the court can order is to have his wishes respected. The property LR Kabare/Nyangati/609/15 half share thereof shall be distributed equal to all the surviving children of the deceased. If it will not be practicable to give each child a portion, the property may be sold and the proceeds be shared equally.

20. With regard to Plot No. 47 Kutus. There was no documentary evidence produced in this court to prove that it belongs to the deceased Thiaka Benjamin alias Thiaka Benjamin. There is a dispute as to whether it belongs to the deceased as the petitioner deposes that the plot No. 47 Kutus was the property of his grandfather Benjamin Njau who is deceased. The protestor has not discharged the burden to prove that

the plot is a free property of the deceased which should be distributed as his estate. The property will not form part of the estate of the deceased and will not be included in the distribution.

21. I have addressed the issues raised in the protest and the protest will proceed as ruled in this ruling and other aspects of the protest shall be dismissed. The grant shall be confirmed in accordance with this ruling. That is to say:-

a) Kabare/Nyangati/4774 – Petitioner

Kabare/Nyangati/4775 – Justus Ndambiri Thiaka.

Kabare/Nyangati/4776 – John Njiru Thiaka

Kabare/Nyangati/4778 – James Nyaga Thiaka.

Kabare/Nyangati/4779 – Joseph Njau Thiaka.

b) Proceeds in Equity Bank A/c No. [xxxx],.

- Barclays Bank – Embu A/c No. [xxxx],.

- Post Bank A/c No. [xxxx],.

- Barclays Bank Shares A/C No. [xxxx], –

Shall be distributed equally to all the beneficiaries.

c) Plot No. Kabare/Nyangati/4773 – Shall be distributed equally among:-

- Grace Wanjiku

- Jenifer Muthoni Gachoki

- Mary Wambui Thiaka

- Wacuka Thiaka

- Gladys Micere Thiaka

- Dorcas Waithira Thiaka

- Joseph Murimi Ndege

- David Omi Thiaka.

d) Kabare/Nyangati/4777 –

- Wacuka Thiaka

- Mary Wambui Thiaka.

e) LR Kabare/Nyangati/609/15 – to be shared equally among all the beneficiaries. They are at liberty to sell and share the proceeds equally.

22. Each party to bear its own costs.

**Dated at Kerugoya this 14<sup>th</sup> day of June 2019.**

**L. W. GITARI**

**JUDGE**