



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO 472 OF 2008

IN THE MATTER OF THE ESTATE OF

FRANCIS MWAI MITHAMO.....(DECEASED)

PATRICK NJOGU MWAI

TERRY WACHEKE MUIGAI.....APPLICANTS

JUDGEMENT

1. This judgement is in respect of the Summons for Confirmation of Grant dated 20/8/15 in which the Terry Wacheke Muigai (the 2nd administrator) seeks orders;

- a. **The grant of letters of administration intestate made to the said TERRY WACHEKE AND PATRICK NJOGU MWAI in respect of the estate on 27th April, 2009 be hereby confirmed.**
- b. **The property forming part of the deceased estate be distributed as per the proposal made by the applicant.**
- c. **Costs of the application be in the cause.**

2. It is premised on the 2nd administrator's affidavit and on grounds that;

- a. **That a grant of letters of administration intestate in respect of the estate of FRANCIS MWAI MITHAMO (deceased) were granted to the said PATRICK NJOGU MWAI AND TERRY WACHEKE MUIGAI on the 27th April, 2009.**
- b. **That the requisite Six (6) months have passed since the said letters of administration intestate was granted.**
- c. **That no application for provision to dependants under Part III of the Law of Succession Act is pending in this or any other court of competent jurisdiction.**
- d. **That the property and beneficiaries of the estate have been identified and distribution of the properties agreed upon by all parties.**
- e. **That it is only mete and just that the grant of letters of administration issued to the Applicant herein be confirmed.**

3. The proposed mode of distribution of the estate herein by the 2nd administrator is found in her sworn averment at paragraph 10 of the supporting affidavit to wit;

<u>LIST OF PROPERTIES</u>	<u>WHO TO INHERIT</u>	<u>SHARES</u>
LAIKIPIA/OL-ARABEL/442	CATHERINE NG'ANG'A	1.4 ACRES-WHOLE SHARE
	TERRY WACHEKE MUIGAI	1.4 ACRES-WHOLE SHARE
	JUSTA WANGU MUCHEMI	1.4 ACRES-WHOLE SHARE
	ROSE NYOKABI	1.4 ACRES-WHOLE SHARE

ELIZABETH GATHONI NJOKI

1.4 ACRES to hold in trust for the

CATHERINE WAMUYU NJOKI

family of IDAH NJOKI

4. It is the 2nd administrator's case that the deceased had during his lifetime sub-divided his land and given his sons 7 acres each as gifts.
5. The Summons is opposed and in what is titled as "objection to confirmation of grant (the appropriate response ought to have been a protest but this does not go to the root of the dispute and this court ignores the anomaly) Patrick Mwai Njogu, a co-administrator, objects to the summons and lists grounds of objection namely;

1. The deceased wished that daughters in law chased away by her sons be provided for.

2. A 2 acres parcel of land be set aside as a grave yard for parents and other family members and the same to be set aside and owned jointly by the beneficiaries for family social purposes.

3. That the land to be set aside and registered in the joint names of the beneficiaries and be held in trust for all family members whether born or unborn. The remaining 5 acres be sub-divided and be shared equally by all the beneficiaries at 0.5 acres and the remaining 0.5 acres be used for access to the individual parcels.

4. That the land set aside be registered in the names of:-

1) Patrick Njogu Mwai(Mr)

2) Catherine Wamuyu Nganga (Mrs)

3) Gregory Kimuri Mwai (Mr)

4) Hellen Wanjiru Kabutha (Mrs)

5) Samuel Mithamo Mwai (Mr)

6) Terry Wacheke Muigai (Mrs)

7) Elizabeth Gathoni Wanyoike (Mrs)

8) Justa Wangu Muchemi (Mrs)

9) Rose Nyokabi Njoroge (Mrs)

5. That my co-Administrator has not consulted me and other beneficiaries in the intended distribution of the estate of the deceased.

6. That as the eldest son, the deceased informed me his wishes and although he died intestate, I have consulted the other beneficiaries and are in agreement that some portion of the land of the deceased be set aside and be held in trust for the family members already existing and those not yet born.

7. That the proposed land for a grave yard and common use is to be registered jointly and held in trust thus no beneficiary will be prejudiced.

The Summon was disposed off by way of written submissions.

8. I have had occasion to consider the Summons and the opposition thereto. The submissions by counsel have been considered and I thank counsels for their exposition of the law applicable in the prevailing circumstances.

9. Without a doubt, this is an open and shut case. The deceased is only survived by children. The Law applicable on the distribution of the estate is **Section 38** of the **Law of Succession Act**. The Section provides:

"S 38. 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".

9. The net estate of the deceased has been established as 7 acres of land.

10. There is evidence which is not controverted and it is actually common ground accepted from both divides that prior to his death the deceased had subdivided his land and given his 4 sons 7 acres of land each.

11. Under the law, such gifts are to be taken into account in determining the share of the net estate finally accruing to the beneficiaries.

S 42 of the Law of Succession Act Provides;

“S 42. Where -

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35,

that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

This gifts *inter vivos* are to be taken into account during distribution.

12. The rationale is easy to see. The law aims at promoting fairness and equality such that no beneficiary ought to secure undue advantage in the distribution of the estate to the detriment of the others who stand in the same capacity as beneficiaries.

13. The decision in the Estate of Ruth Nyakanini Rukwaro (Deceased) [2016] eKLR is spot on. The judge stated’

“...in my view, the spirit of Part V of the Law of Succession Act is equal distribution of the estate amongst the beneficiaries of the deceased. My reading of these provisions is that they envisage equal distribution. The word used in Section 35 (5) and 38 is “equally” as opposed to “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms-“the property shall.....be equally divided among the surviving children.” Equal distribution is envisaged. Guided by the above provisions I find that the deceased petitioner now represented by the protestor and the applicants herein are entitled to equal shares of the deceased’s estate.”

14. The gifts *inter vivos* to the sons are complete. The decision in Reginal Nyambura Waithatu –Vs- Tarcisio Kagunda Waithatu & 3 others [2016] eKLR illuminates the position very well. The learned Judge had this to say;

“...also for a gift inter vivos to be complete, it is also a requirement that the donor has to divest him or herself of the property; he or she has to place it in the possession of the done. To me this requirement was satisfied the moment each of the beneficiaries was shown his or her portion. Clearly, the evidence adduced confirms the deceased’s intent to gift all his children and that his actions were voluntary. Even if we were to disregard the above evidence to the effect that the deceased divided his land and shared it out among his children inter vivos as aforesaid, and maintain the position that the deceased never divided his land at all, then on the question of distribution, the starting point is to refer to the relevant applicable law. Section 38 of the Law of Succession Act provides that:- “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” In my view, the spirit of Part V of the Law of Succession Act is equal distribution of the estate.”

15. In his objections (Sic) Patrick Mwai Njogu suggests that the deceased wanted his daughters in Law chased away by his sons be provided for and that a 2 acres parcel of land be set aside as a grave yard for parents and other family members to be owned jointly by beneficiaries.

16. It is trite Law that the wishes of the deceased ought to be respected. I have, however, pored through the record herein and have not found any iota of evidence of the alleged wishes by the deceased.

17. Patrick states that as the eldest son, the deceased informed him of his wishes. He has not endeavoured to adduce evidence along these lines.

18. My evaluation of the evidence leads me to the inescapable conclusion that the deceased who appears to have been immersed in the old African traditions where sons matter more than daughters deliberately gave a larger portion of land to his 4 sons during his lifetime leaving only 7 acres available as the net estate at his death.

19. He was survived by a widow (now deceased) and children. The estate is thus available to the children and in terms of Section 38 of the Act, they should share the estate equally.

20. But as observed above, the Court will in accordance with Section 42 of the Law of Succession Act have to put into account the gifts *inter vivos* made to the sons.

21. Noting the net estate available and the portions gifted to the sons, i am satisfied that the sons were adequately provided for and in view of the available property for distribution they ought to be excluded in the distribution.

22. The proposal by Terry Wacheke Muigai as laid out at paragraph 10 of her affidavit is just, fair and equal in the circumstances and it meets the spirit of S 38 of the Act.

23. With the result that I allow the Summons for confirmation of grant dated 20/8/15 and confirm the grant in the following terms:

<u>LIST OF PROPERTIES</u>	<u>WHO TO INHERIT</u>	<u>SHARES</u>
LAIKIPIA/OL-ARABEL/442	CATHERINE NG'ANG'A	1.4 ACRES-WHOLE SHARE
	TERRY WACHEKE MUIGAI	1.4 ACRES-WHOLE SHARE
	JUSTA WANGU MUCHEMI	1.4 ACRES-WHOLE SHARE
	ROSE NYOKABI	1.4 ACRES-WHOLE SHARE
	ELIZABETH GATHONI NJOKI	
		1.4 ACRES to hold in trust for the
	CATHERINE WAMUYU NJOKI	family of IDAH NJOKI

24. Each party to bear its own costs.

Dated and Delivered at Nakuru this 12th day of June, 2019.

A. K. NDUNG'U

JUDGE