



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 52 OF 2016

(FORMERLY MERU SUCCESSION CAUSE NO.482 OF 2015)

IN THE MATTER OF THE ESTATE OF PETER NJERU N'NKIRIA alias PETER NKIRIA (DECEASED)

AND

WYCLIFF GITONGA PETER.....1ST ADMINISTRATOR/APPLICANT

VERSUS

EUSTACE KENT NKONGE.....2ND ADMINISTRATOR/RESPONDENT

PERTY SHEN MIRITI.....3RD ADMINISTRATOR/APPLICANT

BENSON MICHENI.....4TH ADMINISTRATOR

VIOLET CIAMUTEGI NDIA.....INTERESTED PARTY

J U D G E M E N T

1. This cause relates to the estate of the late **PETER NJERU M'NKIRIA** (deceased) who died on 27th July 1980 in Nairobi but domiciled in Thuita Location Magumoni Division, Meru South. The petition for letters of administration indicates that the deceased died intestate leaving behind four wives and 23 children or dependants.

2. According to the chief's letter dated 13th July 2015 and filed in court on 12th November 2015 the deceased left behind the following dependants.

(A) 1st House - Grace Kanoti - widow (deceased)

i. Godfrey Mukwogo - son (deceased)

ii. Regina Kaari Peter

iii. Kenneth Mbaya

iv. Beth Njeri

v. James Mwalimu

vi. Humphrey Kithinji

vii. Eustace Kent Nkonge

viii. Mary Igoki

ix. Royford Bundi Peter

(B) 2nd House Margaret Kainda Peter - widow (deceased)

- i. Benson Micheni Peter
- ii. Edward Riungu - (deceased)
- iii. Varcity Kagendo (deceased)
- iv. Donald Kinyua
- v. Jotham Kamundi (deceased)
- vi. Jafford Kaburu (deceased)
- vii. Idah Muthoni
- viii. Loise Wanja

(C) 3rd House - Rahab Kainyu Peter

- i. Dorothy Gatakaa (deceased)
- ii. Petkey Shen Miriti
- iii. Edwin Ndereba
- iv. Hilder Kanini
- v. Rogers Gitari

D. 4th House Jane Maitha - (deceased)

- i. Jeniffer Muthoni
- ii. Purity Karimi
- iii. Wycliff Gitonga
- iv. Silviah Kanya
- v. Felix Njagi (deceased)

3. The properties comprising the estate in this cause as per the petition herein are as follows:-

- i. L.R Magumoni/Thuita/384
- ii. Karingani/Mugirirwa /493 &
- iii. Plot No. 19 Kibugua Market

4. The following were appointed the administrators of the estate of the deceased vide a grant issued on 16th September, 2016 namely:-

- i. Wycliff Gitonga Peter
- ii. Eustace Kent Nkonge
- iii. PetKey Shen Miriti and
- iv. Benson Micheni Macpeter

5. Wycliff Gitonga Peter, the Petitioner/1st Administrator vide Summons for Confirmation of Grant dated 13th September 2016 applied for confirmation of grant following this court's directions issued on 5th September 2016. The 1st administrator proposed to have the estate distributed as follows:-

a) L.R. Karingani/Mugirirwa/493 measuring approximately 3.5 acres to vest in the estate of the late Ndia Njeru a deceased brother to the deceased herein.

b) Plot No. 19 Kibugua Market.

(i) Petkey Shen Miriti 25 ft x50 ft front view to hold in trust for Rahab Kainyu and her children.

(ii) Benson Micheni Peter 25x50ft front view to hold in trust of house of Margaret Kainda.

(iii) Wycliff Gitonga Peter 25x50ft rear side to hold in trust of the house of Jane Maitha.

(iv) Eustace Nkonge 25x50ft rear side to hold in trust for his benefit and in trust of the house of Grace Kanoti.

(c) L.R. Magumoni/Thuita/384

The 1st administrator proposes the 18 acre parcel of land be shared to each house as each house has had exclusive use of their respective portions since 1950 and proposes that the Land Registrar and District Land Surveyor visits the estate to demarcate according to occupation of each of the 4 houses.

6. The Petitioner/1st administrator in support of his proposed mode of distribution filed an affidavit sworn on 28th November 2016. The Petitioner depones that the deceased had 4 wives namely:-

i. Grace Kanoti - 1st wife (deceased)

ii. Margaret Kainda - 2nd wife (deceased)

iii. Rahab Kainyu - 3rd wife

iv. Jane Maitha - 4th wife (deceased)

He has listed the dependants as follows:

(a) 1st House Grace Kanoti

i. Geoffrey Mukwogo- son (deceased) left behind Murithi Mukuongo and Karimi Mukuongo.

ii. Legina Kaari- Daughter (married)

iii. Kenneth Mbai - son

iv. James Mwarimu - (deceased) - No family

v. Humphrey Kithinji - son (deceased) left behind Munene Kithinji, Njau Kithinji and Kelvin Kithinji.

vi. Beth Njeri- married

vii. Eustace Kent Nkonge - son

viii. Mary Igoki - Daughter

ix. Loyford Fundi - son

(b) 2nd House Margaret Kainda

i. Edward Riungu - (deceased) left behind Murithi Riungu, Kanini Riungu, Gaceri Riungu, Karimi Riungu and Muchiri Riungu.

ii. Benson Micheni- son

iii. Vercity Kagendo (deceased) Daughter - Married

iv. Markdonald Kinyua - son

v. Fredrick Kamundi - deceased son left behind Linnet Mukami

vi. Jafford Kaburu- Deceased (no family)

vii. Idah Muthoni- daughter

viii. Wanja Peter - daughter

(C) 3rd House Rahab Kainyu

i. Dorothy Gatakaa- daughter (married)

ii. Petkey Shen Miriti- son

iii. Edwin Ndereva - son

iv. Hilda Kanini - daughter (married)

v. Lodgers Gitari- son

(D) 4th House- Jane Maitha Njeru

i. Jeniffer Muthoni - Daughter

ii. Purity Karimi- Daughter

iii. Wycliff Gitonga Peter - son (Petitioner)

iv. Silvia Kanyua - Daugher (married)

v. Felix Njagi- son (deceased) left Gidlif Mugambi

7. According to the 1st administrator the total number of children who were alive as per 28th November 2016 were 18 while 5 were deceased but have left behind children. He has therefore opined that the number of units of the beneficiaries are 23.

8. He maintains that though the deceased never left a will he in his wisdom shared out parcel No. Magumoni/Thuita/384 into 4 portions and showed each house where to occupy and utilize and that that arrangements have persisted for over 36 years with mature trees marking out boundaries of each of the 4 portions.

9. The first administrator has accused the 2nd, 3rd and 4th administrator for wanton destruction of trees in their respective portions and that to him explains why some portions of the estate still have trees/vegetation while the others barely have any trees left. He further contends that each household knows the boundaries of their respective portions adding that different household have been burying their dead in the respective portion and that to minimize massive destruction of developments each household should stick to where they have been occupying.

10. The Petitioner depones Plot 19 at Kibugua Market is partly developed on the efforts of the deceased, Jane Maitha and Benson Micheni.

11. As regards parcel No. Karingani/Mugirirwa/493, the Petitioner contends that though the property is in the name of the deceased herein, the information he got from the deceased and his mother Jane Maitha was that the parcel belonged to Ndia Njeru a brother to the deceased and since he is also deceased, the parcel should go to his family. He contends that Njeru Ndia, his late mother and daughter are all buried in that land. He asserts that the deceased was registered because the late Njeru Ndia was in prison at the time of demarcation and adjudication.

12. In his testimony during trial, the Petitioner added that they have no claim on the parcel because the parcel did not belong to their late father and that he was only a trustee of that parcel which he held for his brother Ndia Njeru. According to him the deceased herein did not transfer the parcel to his brother Ndia Njeru because he feared that he was likely to sell it and that Ndia Njeru was comfortable with the deceased holding the title for him. He alleges that his brothers (Nkonge and Mwititi) only raised issues over parcel No.493 when after their father (deceased) had passed on.

13. The evidence of the 1st administrator on distribution was supported by Jeniffer Muthoni (PW2) who affirmed that she was a daughter to the deceased and was aware of how the deceased had subdivided his land (parcel No.384) into 4 portions with each house shown where to occupy and utilize. She conceded that some houses have bigger portions than others but added that she has no issues with that because that is how their late father wanted. She faulted Eustace Ken Nkonge, the 2nd administrator for taking the surveyor to the estate without the participation of all the houses. She however confirmed that there is a road which passes through the estate (parcel No.384) but that each house knows the respective boundaries.

14. The witness (PW2) further added that parcel No.493 does not form part of the estate because the parcel belongs to Ndia Njeru. She stated that the parcel was held by their late father in trust for Ndia who was in prison during the land Registration exercise. She added that none of the children of the deceased has ever set foot on that land because that land belongs to Ndia's family and it would be a curse if any

of her siblings claims a share from there. She opined that the estate should be divided according to the number of the houses with each house getting equal share of household share.

15. In his written submissions done through learned Counsel M/S I.C Mugo and Co-Advocates, the 1st administrator has framed issues he feels should be determined by this court. The same are:

- a) The applicable law in the administration of the estate herein given the date of death of the deceased herein. Whether customary law or Law of Succession Act should be applied in the distribution of the estate.
- b) Who the legal beneficiaries of the deceased should be given the provisions of **Section 29 of Law of Succession Act**?
- c) Which property comprises the estate and hence available for distribution
- d) Whether **Section 28 (d) and 42 of Law of Succession Act** apply here.
- e) What is the fair mode of distribution of the estate in the absence of a consent.
- f) Whether this court should exercise discretion and equity to mitigate injustice and harshness of the law.

16. The 1st administrator submits that the customary law should be applied here because the deceased died on 27th July 1980 before commencement of Law of Succession Act on 1st July 1981. He had argued that **Section 5(1) of the Judicature Act** provides for the application of customary in dispensing justice as long as the same is not repugnant to justice and morality. He has faulted the 2nd, 3rd and 4th administrators' proposal stating that their proposal is discriminatory to the daughters. He has further contended that none of the parties herein adduced evidence on Meru Customary Law that indicates that married daughters should not get a share. He asserts that a customary practice or law is a matter of fact which must be proved and that in the absence of evidence, this court cannot be persuaded not to give a share to the married daughters.

17. The Petitioner has further submitted that parcel No.493 was being held by deceased in trust for the benefit of Ndia Njeru and that parcel should be given to the Interested Party in this cause for herself and in trust of her children. The 1st administrator has contended that this court has jurisdiction to determine the question of trust within this cause and has relied on a court of Appeal decision in the case of *Margaret Ncekei Thurairia- vs- Mary Mpinda & Rebecca Karwitha M'Magiri* (Court of Appeal Civil Appeal No.13 of 2015)

18. The 1st administrator has faulted the proposed mode by the 2nd to 4th administrator stating that their suggestion would lead to balkanization of the estate into many uneconomical parcels. He has also pointed out that the 2nd and 4th administrators have left out some daughters of the deceased claiming that they are not interested which is not the case according to him. He has termed the proposal by Nkonge and Miriti to buy out some portions as not tenable as giving some property to deceased person. He has termed a proposal to set aside 0.58 acres for access road unnecessary as in his view each house in their respective positions has an access road.

19. The 1st administrator has also faulted the surveyor for purporting to distribute the estate when according to him, this court had not directed him to do so. His view is that this court had only directed him to survey occupied part of the estate and the settlement arrangements on the ground and not to create additional features like burial sites and access roads. In his view, the land surveyor was compromised as his report reflects the proposals made by both the 2nd and 4th administrators.

20. The Petitioner has suggested that the estate either be divided into 4 equal parts as per the arrangements that have been in place for over 35 years or the parcel be divided equally among all the 23 dependants except the wives of the deceased. The 1st administrator interestingly has also suggested the estate should alternatively be divided equally among all surviving children with surviving widow having life interest on the entire estate and the children should only share or get their respective shares when the life interest of the surviving widow determines or ends. He says all the children of the deceased children should get their share of their respective deceased fathers. He proposes that plot 19 at Kibugua market should be divided into 4 equal parts according to the houses.

21. Violet Ciamutegi Ndia, the Interested Party in this cause has filed an affidavit sworn on 15th September 2018 has deposed that all the administrators in this cause are sons to the deceased who was a brother to her late husband Ndia Njeru. She contends that the deceased herein took her late husband as his younger brother and treated him as a son and that he settled them in parcel No. 493 where all her 9 children were born and brought up. She further deposes that they have planted coffee, avocado trees eucalyptus trees apart from rearing livestock. She has also added that Ndia Njeru has been buried in that parcel.

22. It was Interested Party's case that when she got married to Ndia Njeru in 1971, she found him living in that parcel 493. She denied suggestions made to her that her husband had a parcel known as Karingani/Mugirirwa/377 stating that she had never heard about that parcel. She asserted that she and her family had been occupying parcel No.493 and the deceased in his lifetime never interfered with their exclusive occupation and neither any of the dependants of the deceased stepped into that parcel. She further testified that it was her mother in law Ciamuthi Njeru, a step mother to the deceased herein who told the deceased to keep the title until when Ndia's children were grown ups and that the mother in law knew her son (Ndia) better. The Interested Party further confirmed the Petitioner's assertion that her husband was in prison during demarcation and registration of parcels of land was true and that explains why the deceased got himself registered on his behalf. She added that the deceased got himself registered as a trustee. He added that the deceased in his lifetime never asked them to leave that parcel.

23. The evidence of the Interested Party was supported by Lydia Wanjoki Njeru (Interested Party W2) who testified that she knew the late Ndia Njeru well as they were neighbours. The witness who was quite advanced in age recalled that when Ndia came back from prison he

lived with his mother (Ciamiti) in parcel No. 493. She added that she never saw Peter (the deceased herein) come to that parcel adding that land at that time could not be registered in women's name and that is why Peter Njeru (deceased) was registered to hold the land for his brother who according to her was in prison at the time.

24. M'Kanga Muthamia (Interested Party W 3) testified also and supported the evidence tendered by Interested Party W1 and Interested Party W 3 in regard to parcel 493. According to him that parcel belongs to Ndia Njeru and was held in trust for him by the deceased. He testified under cross-examination that he knew the father of both Ndia Njeru and Peter Njeru to be one Njeru Mwatho who had 3 wives. He added that parcel No.377 during demarcation went to one Alexander Kanampiu and that later one Magiri sold it. He added that the land that was meant for Ciambiti the mother to Ndia Njeru was registered in the name of Peter Njeru (deceased) and that when Ndia came back from prison he did not ask his elder brother to transfer the land to him for reasons unknown to him.

25. In her written submissions done through Ms Lucy Kaaria, Matumbi & Co Advocates, the Interested Party has contended she and her family have been the sole users and occupiers of Land parcel No. Karingani/ Mugeririwa/493 during the lifetime of the deceased and long after his demise and without any interference.

26. The Interested Party has submitted that the 2nd and 4th administrators have not disputed the relationship between her and the deceased herein and her occupation of the parcel land while her late husband was in prison. She has contended that the said administrators have not proved the claims that Ndia Njeru sold his parcel of land. In her view the fact that the deceased allowed them to occupy and utilize the parcel of land (493) means that they qualify to be considered dependants within the meaning of **Section 29 of Law of Succession Act**. She relies on the decision in Morris Mwiti -vs- Dennis Kimathi M'Mburugu [2016] eKLR which held that where a party made a living on the deceased's estate prior to his death, he/she is entitled to the same as a dependant under **Section 29 of Law of Succession Act** as the deceased had allowed him to construct a house within the estate. She has also cited the decision in the case of Re estate of Joseph Kimani Karanja [2019] eKLR which expressed that because the deceased maintained his sisters and brothers it was just to nullify the grant to determine the issue of dependency.

27. On the other hand, the 2nd to 4th administrators have objected to both the proposal by the 1st administrator and sentiments expressed by the Interested Party. They have relied on a joint affidavit sworn on 2nd October 2016 where they have agreed with the 1st administrator that the deceased was married with four wives and that each administrator chosen here represents a house in the 4 houses.

28. They have further contended that the issue of ownership of parcel No.493 was determined by the High Court in Meru vide Appeal No. 2 of 2010 which appeal was filed against Chuka Principal Magistrate's Court Succession Cause No. 39 of 2006. The 2nd to 4th administrators have deponed that the 1st administrator and the Interested Party have failed to disclose this and have exhibited the proceedings in Meru High Court Civil Appeal NO. 2 of 2010 to back up their claims.

29. The 2nd to 4th administrators have denied the suggestion that the deceased did distribute his estate in his lifetime. They aver that during the lifetime of the deceased all the 4 wives lived in one house with a common kitchen.

30. The three have contended that parcel 384 which is the main property comprising the estate measures about 17 acres with 3 different areas having different commercial value. One part is said to be near the tarmac road to Kibugua market and is of higher commercial value as compared to the lower part which is hilly and of less commercial value. They aver that they sat down as a family and decided against following the Meru Customary Law which could have meant that the land be divided into 4 equal parts. In their view dividing the estate into 4 equal parts as dictated by Meru Customs would interfere with developments carried out by different beneficiaries and that some would be displaced from where they have been living in permanent structures for over 26 years. They have proposed each beneficiary get an equal share of each of the economic zones and that the going by the number of beneficiaries each beneficiary (they have listed 31) should get 0.93 acre. They have proposed to set aside 0.1 acre to be burial site. They further propose that a portion measuring 45ft x 200 ft be sold to Nkonge who is willing to buy while Miriti be given 30ft x100ft to buy in order to raise funds for legal fees incurred in this cause.

31. They have further proposed that despite the decision from High Court in Meru they are willing to give the Interested Party 0.5 acre in parcel No.493 to cover where the grave of the late mother of late Ndia and to accommodate Ndias Children. They propose that the remaining portion be sold and proceeds shared equally among all the lawful beneficiaries in this cause.

32. They have further proposed that Kibugua plot 19 at Kibugua Market be shared equally among Eustace Kent Nkonge, Benson Micheni, Rogers Gitari and Gedion Njagi since the few contributed towards the development of the plot.

33. In their further affidavit sworn on 2nd October 2016 and 22nd December 2016 the 2nd to 4th administrators have deposed that after the Succession Cause in Meru, they installed beacons to mark out boundaries in the estate as per the agreed subdivision but have alleged that the Petitioner pulled down the beacons as he preferred the estate being divided into 4 units as per the number of houses to gain an advantage in view of the fact that there are only two sons in the 4th house. The 2nd to 4th administrators have given suggestions on following mode of distribution;

L.R Magumoni/Thuita/384:

- i. Kenneth Mbaya Njere - 0.23 acre
- " " " - 0.43 acre
- " " " - 0.27 acre

0.93 acre

- ii. Eustace Kent Nkonge - 0.28 acres
- " " " - 0.27 acre
- " " " - 0.1 acre

Total **0.93 acre**

iii. Eunice Njeri Kithinji (estate of late Humphrey Kithinji M'Nkiria) to hold in trust for Kennedy Munene, Alex Njau, Kevin Kirimi and Duncan Gitonga (1st share) - 0.28 acres

2nd share - 0.35 acre

3rd share - 0.27 acre

Total - **0.93 acre**

iv. Antony Murithi Muguongo (on behalf of late Godfrey Muguongo)

- 0.23 acre

- 0.27 acres

Jane Ngugi Mugambi on - 0.43 acre

behalf of late Godfrey Muguongo **0.93 acre**

v. Murithi Edward, Ernest Muchiri, Casty Kanini and Fridah Karimi (on behalf of the late Edward Riungu)- 1st share - 0.23 acre

2nd share - 0.16 acre

3rd share - 0.27 acre

0.93 acres

vi. Loyford Bundi Njeru - 0.23 acre

2nd share - 0.43 acre

3rd share - 0.27 acres

0.93 acre

vii. Benson Micheni Macpeter

1st share - 0.23 acre

2nd share - 0.26 acre

3rd share - 0.17 acre

4th share - 0.27 acres

0.93 acre

viii. MacDonald Kinyua Peter 1st share - 0.23 acre

2nd share - 0.21 acre
3rd share - 0.22 acres
4th share - 0.27acre
Total **0.93 acre**

ix. Aidah Muthoni & Rose Wanja (on behalf of late

Margaret Kainda Peter) - 0.23 acre
2nd share - 0.21 acre
Linnet Mukami & Benson Micheni MacPeter and
MackDonald Kinyua (on behalf of Margaret Kainda Peter)
- 0.27 acre
Total - **0.93 acres**

x. Jeniffer Muthoni, Purity Karimu Njeru and Sylvia Kanyua (on behalf of the late Jane Maitha Peter.

1st share - 0.23 acre
2nd share - 0.43 acre
3rd share - 0.27 acre
Total **0.93 acre**

xi. Purity Karimi Njeru in trust for Gedion Mugambi Njagi (on behalf of late Felix Njagi Peter).

1st share - 0.36 acre
2nd share - 0.27 acres
Total **0.93 acre**

xii. Wycliff Gitonga Peter

1st share – 0.23 acre
2nd share- 0.43 acres
3rd share – 0.27 acres
Total **0.93 acre**

xiii. Rahab Kainyu Peter

1st share - 0.18 acre
2nd share - 0.48 acre
3rd share - 0.27 acre
Total **0.93 acre**

(vii) Jafford Kaburu (deceased)

He added that James Mwalimu, Jafford Kaburu and Jotham Kamundi died without children but the other 5 left behind children.

40. The witness under cross-examination changed tune and stated that 18 children of the deceased are alive and that only 4 sons of the deceased left behind children. He conceded that the estate should be distributed equally to 17 children as some of the sisters are not interested and named them as Dorothy Gatakaa, Hilda Kibuti, Regina Kaari, Beth Njeri, Mary Igoki., Racit Kagendo, Hilda Muthoni and Rose Wanja. He added that the daughters from the 4th house Jennifer Muthoni, Purity Karimi and Sylvia Kanyua had initially stated that they had no interest but later changed their minds. He conceded that he had no consent or affidavit from any of the sisters he named showing they had renounced their interests. He further referred this court to a sketch map indicating where each house occupies. The occupation of each house is coloured in 4 different colours of blue (Margaret Kainda), Orange (Rahab Kainyu), Green Jane Maitha and Pink (Grace Kanoti).

41. He further added that they proposed to sell a portion of the estate and pursuant to that proposal, have sold Kshs.450,000 for 50ft by 200ft and a further 300,000 for 30 ft by 100ft and that Eustace Nkonge has paid Ksh.450,000. He states that the money was paid to Micheni though he had no receipts to prove the same. He stated that the money was meant for administrative costs and cases in court though he conceded that they had no mandate to sell any part of the estate. He added that the District Surveyor visited the estate in the company of the Area Chief and earmarked 0.58 acres for access roads and 0.14 acre as a burial site. He added that he was not present when the surveyor visited but that his representative was present.

42. He further claimed that 3 acres remaining in parcel No.493 should be sold because of the hostility. He conceded that after his late father migrated from parcel No.493 none of the family members went back as the parcel was occupied by Ndia and his family. He further conceded that all Ndia's children were born in that parcel and some of the children died and buried there as well as Ndia though he added that Ndia was buried secretly. He added that Ndia never demanded parcel No.493 during the deceased lifetime and could not tell if the deceased demanded that Ndia gets out that parcel either.

43. In their written submissions the 2nd, 3rd and 4th administrators through Ms Mutitu Thiongo & Co Advocate, have submitted that parcel No. Karingani/Mugirirwa/493 was registered in the name of the deceased as his inheritance from their late father, the late Njeru Mwatho. They contend that the other brothers of the deceased also got their respective shares with Magiru Njeru (one of the sons) getting parcel No.476 which was registered in the name of his son Nciema Magiri. They claim that the late Magiri Njeru was murdered by the late Ndia Njeru and was jailed on account of that crime. It is their submissions that Ndia Njeru was allocated parcel No.377 but he sold to one Nabea Kiganka. The other two brothers of the deceased herein were not given a share as they had allegedly migrated to other areas (Embu).

44. The 2nd to 4th administrators have submitted that though the deceased allowed the late Ndia Njeru and his family to settle on parcel No.493 they do not fit into the ambit of **Section 29** of the **Law of Succession Act**. They contend that they have been considerate enough to surrender 0.5 acre to Ndia's family so as not to evict them and that the share is gratuitous because in their view that family are tenants at will. They claim that if the deceased intended to give that parcel to Ndia he could have done so in his lifetime. They submit that they should be allowed to dispose the 3 acres and share the proceeds equally among all the beneficiaries in this cause.

45. The 2nd to 4th administrators further contend that the court in Meru vide HCC No.2 of 2010 had previously found that the deceased was the registered owner of parcel No.493 and have urged this court to adopt that finding.

46. The 2nd to 4th administrators have alleged that the Petitioner's proposal is unfair as it would give him an advantage of getting more prime areas as compared to other beneficiaries and that the sisters of the 1st administrator are all married but have been catered for despite that fact. They urge that the sisters be given only the share that would have gone to their late mother. They have urged this court to adopt the surveyor's report and divide the estate (384) according to the total number of children rather houses. They have denied that the allegations that the deceased subdivided his parcel (384) into 4 portions in 1950s arguing that adjudication process took place in 1966 and if that was the case the estate would have got 4 different titles. They have submitted that there is no division on the ground or beacons to mark out different portion. They have faulted the Petitioner's proposal stating that the same is in their view based on a non-existent theory.

47. They have suggested that the Deputy Registrar of this court should visit the estate (384) in order to establish that the ground cannot support a suggestion to divide the estate into 4 portions. In their view the 1st administrator wants to get a bigger share near the road which is more valuable while they have given a suggestion that ensures every beneficiary gets an equal share of commercial areas.

48. The 2nd to 4th administrators have submitted that plot 19 Kibugua market should be distributed to 3 sons and one daughter who would hold it in trust for Gedion Mugambi Njagi.

49. The 2nd to 4th administrators have submitted that the 1st administrator's proposal is based on Meru Customary Law. They contend that though **Section 3 (2)** of Judicature Act and the Constitution allows for the application of customary law; its application is limited to;

“ So far as it is applicable and not repugnant to justice and morality or inconsistent with any laws.”

They have contended that any law that is discriminatory is not consistent with the Constitution and should be declared void. In their view the customary law practice cited by the 1st administrator is a smokescreen for discriminatory conduct likely to favour one party and disinherit others. They have urged this court to find that the proposal to subdivide the estate as proposed by 1st administrator is backward and repugnant to justice as it will not be equitable. In their view African Customary Law is not static and is influenced by education, religion and other factors. In their view the customary practice should not be used by one party for selfish reasons given that the proposer, the 1st administrator comes from a house with fewer children or dependants therefore likely to benefit more than the other houses who have

more dependants.

50. They further hold the view that adopting the customary practice would promote inequality and discrimination and that upholding a practice that would promote unequal distribution of parcel No.384 would be repugnant to justice and morality. In their view mechanism used to solve dispute under customary law called for negotiations, mediation, conciliation settlement, and consensus approach. They submit that their proposal takes into consideration equitable divisions where each beneficiary would remain undisturbed to avoid a situation where a beneficiary would be forced to compensate another who will be forced to move or relocate. That in their view is not practical as some beneficiaries are not endowed in terms of financial resources.

51. They have further submitted that their proposal is equitable given that they ensured that each beneficiary gets an equal share of different economic zones in the estate. They have cited **Article 159(3)** of the **Constitution** in urging this court not to use a traditional dispute resolution mechanism that results in outcomes that are repugnant to justice and morality or inconsistent with the constitution. They claim that the 1st administrator has not offered any basis to justify his proposal that in their view clearly favours him. They have urged this court to go by their proposal stating that the proposal is fair and just to all the beneficiaries.

52. (a) Analysis and Determination:

This court has considered this matter and there is no doubt that parties have taken strong different positions with each side claiming that their way is the most fair and just one. In my view despite the fact that this Succession Cause has been a long drawn battle over a number of years there are 3 major issues for determination namely:

- i. Whether property L.R No. Karingani/Mugirirwa/493 is part of the estate herein available for distribution or was held by deceased herein in trust for the late Ndia Njeru.
- ii. Who are the lawful beneficiaries to benefit from which net estate of the deceased herein.
- iii. How should the net estate be distributed.

53. (i) Whether parcel No. 493 was held in trust:

There is no dispute the late Ndia Njeru was in occupation of parcel 493 both during the lifetime of the deceased and after his demise. Going by the evidence presented, all witnesses from both sides agreed on this fact It is also not contested from the facts presented that during the demarcation and adjudication exercise in the area in which parcel No.493 is situate, the late Ndia Njeru was in prison serving an unknown term in prison for the murder of his brother known as Magiri. It is clear therefore that the late Ndia Njeru must have had his share held in trust for him.

54. This court finds that both sides i.e the 1st administrator and the Interested Party on one hand and 2nd to 4th administrators on the other hand agreed that indeed it was possible at the time to have a person registered as owner but in real sense he was to hold it in trust for his absent brother since women at time could not be registered as title/land owners. The only point of departure between the two sides is who was registered to be the trustee of the late Ndia Njeru. The 1st administrator and the Interested Party held that it was the deceased in this cause Peter Njeru who was the trustee of Ndia Njeru's parcel (493) while the 2nd to 4th administrator hold that Magiri Kanampiu was registered to hold parcel No. 377 in trust of Ndia Njeru. They hold that Ndia Njeru instructed Magiri Kanampiu upon getting out of prison to transfer his parcel number 377 to one Nabea Kiganka. The big question before me therefore is to determine which parcel was being held in trust for the late Ndia Njeru and by extension the Interested Party herein by virtue of being the wife of the late Ndia Njeru.

55. It is important to note that trust is a question of fact which must be established and proved to the required standard in civil matters which is on a balance of probabilities. Again I have considered the facts presented before me and the weight of those facts. It is again true that a trust can be direct (which means formal or formalized through registration) or implied or constructive from the actions or conduct of the parties.

56. I have considered the evidence by the 2nd and 4th administrators and in particular the evidence of Alexander Kanampiu Magiri who testified that Ndia Njeru was allocated parcel No.377 which one Kanampiu held for him in trust and that the parcel was later transferred to Nabea Kiganka for some consideration. However in my view that evidence is inconsistent with evidence of the same witness and in particular the evidence of 2nd, 3rd and 4th administrators (in their paragraph 12 of the affidavit sworn on 9th January 2019) that Ndia's mother was allowed to stay in parcel No.493. Why would she settle in parcel No.493 when her share was 377? I have also considered the evidence of M'Kanga Murwithania who in my view posed a legitimate question regarding the claim that Kanampiu was registered to hold parcel No.377 in trust for Ndia Njeru. In his view Kanampiu would not have been registered to hold parcel 377 because he was not Ndia's biological brother and that Ndia's biological brothers were alive. That fact that cannot be ignored especially given the following circumstances which in my view swings the pendulum of the law towards the 1st administrator's and Interested Party's position.

57. In the first place, it is apparent that the deceased during his life time never laid any claim on parcel No.493. He did not go back to that land. He did not lease it or utilize it in anyway. Instead, it is Ndia and his family who have been in uninterrupted occupation during the lifetime of the deceased and after his demise.

58. Secondly, none of the deceased's four wives or any of his many children was directed by the deceased herein to go there (493) and either settle or utilize it. Infact the evidence or facts presented shows that none of the wives of the deceased or any of the children including the 2nd to 4th administrators have ever set foot in that parcel.

59. Thirdly, the Interested Party states that when she was married she found her husband Ndia Njeru living on parcel No.493. She

continued living there and realized that the deceased herein held the title. She inquired from her mother in law who was then alive and she was told that the deceased would stay with the title through her instructions until Ndia's children grew up or become adults. The Interested Party told this court that the mother to the late Ndia Njeru obviously knew her son (Ndia) better and found it better not to question the wisdom of her mother in law which I found persuasive. Here was an elder brother (deceased herein) who has been told by this stepmother to keep the title on trust of a questionable character (Ndia) who was said to be in jail and from the evidence tendered that was not the first stint in jail. In my view anyone's on the Interested Party's (wife's) shoes at the time would have found some wisdom in the alleged instructions by the late mother of Ndia to the deceased in this cause to keep the title safe in his custody.

60. In my considered view, the conduct of the deceased in respect to parcel No.493 and the late Ndia Njeru and his family clearly implies that the deceased held parcel No.493 in trust for him. Jennifer Muthoni (PW2) told this court that parcel belongs to Ndia Njeru and that the deceased made it clear that no one of his children should lay claim on it unless one wanted curses. That in my view resonates well with the conduct of the deceased herein. The 2nd to 4th administrators have contended that the deceased could have transferred the parcel to Ndia Njeru in his lifetime which could be true but with vicissitudes of life no one knows the date and time he/she will die.

61. The 2nd to 4th administrators raised a significant point to dissuade me from finding that the deceased was holding the disputed parcel in trust which is the fact that a court of concurrent jurisdiction had determined that the deceased was registered owner of that parcel. However I have perused through the judgment of that court which was sitting on appeal in Meru and my findings are that despite the finding by that court that the deceased was the registered owner of parcel No 493, that finding was in obiter because the overriding factor was the fact that the lower court entertained and determined a matter when it lacked the requisite jurisdiction. That is why the court ordered that a fresh succession be filed and be presented to this court for determination.

62. It is my considered view that the court's decision on implied or constructive trust which is an issue in this cause is not binding because the finding was not a substantive finding based on final adjudication of evidence tendered before it. If the decision was based on evidence tendered then it could have meant that the court had fully adjudicated upon the issue, rendering the issue res-judicata which was definitely not the case here.

63. It is also the finding of this court that the question of trust in regard to parcel No, 493 really is unquestionable. The 2nd and 4th Respondents even in their proposal have acknowledged albeit covertly on the existence of that trust and that is why they have suggested to give Ndia's family 0.5 acres. They want to be allowed to sell the remainder because obviously they cannot fathom any of them be told to go and occupy it and that explains why they are shy about taking occupation because they have only indicated that they are likely to face hostility.

65. It is my considered view that this practice of children questioning why their late parents allowed any of their kin to settle on a parcel of land they own or hold in trust with clear indication that the settlement was meant to permanent should be discouraged. In situations such as this where the deceased allowed his step mother, to settle on the land together with her children. The intentions are clear to see. The step mother was buried on that parcel and no one raised any issue. The issue was only raised when Ndia died after the demise of the deceased by the 2nd to 4th Respondents perhaps with a view to reclaiming that parcel when all indications point to the fact that the deceased herein was holding that parcel in trust for his younger brother. This court finds that implied trust in respect to a parcel No. 493 has been proved to the required standard in law. That parcel does not and cannot form part of the net estate of the deceased herein within the meaning of **Section 3 (1) of the Law of Succession Act** and to that extent is unavailable for distribution in this cause. The parcel shall go to the Interested Party for her benefit in trust for her surviving children.

66. This court's decision is emboldened by the position taken in the Court of Appeal Nyeri in civil Appeal No. 13 of 2015 Margaret N. Thurania -vs- Mary Mpinda & Another [2015] eKLR where a suit property was registered in the name of a deceased person because the beneficial owner was a woman who could not be registered because of lack of Identity Card. The court agreed with the High Court's finding that there was a demonstrable trust and it did not matter whether the claim was made under **Section 29** or **Section 66** of **Law of Succession Act**. The court further held that it did not matter that the trust had not been registered against the title. The Court of Appeal referred to the case of LIMULI – VS MARKO SABAYO (1979) KLR 251 which stated that there was nothing in the R.L.A (now repealed and replaced by L.R.A) that prevents the declaration of a trust and there was nothing to prevent giving effect to such a trust.

67. Furthermore in the case of Margaret Wanjiku Kiuru –vs- Henry Kiuru Tubania [2017] eKLR, the court held as follows in part:

“ The requirement for a constructive trust are explained in detail in Halibury's Law of England 4th Edition Vol.48 at paragraph 690 which states:-

“A constructive trust will arise in connection with the legal title to property wherever one party has so conducted himself that it would be inequitable to allow him to deny the other party on beneficial interest in the property acquired. This will be so where:

1. There was a common intention that both parties should have a beneficial interest and

2.The claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest.....”

The conduct of both the deceased herein and the late Ndia Njeru as I have observed above was unmistakable. The deceased in this cause held parcel No.493 in trust for him and never intended take advantage of his younger brother's troubles with the law.

68. (ii) **Who are the lawful dependants/beneficiaries.**

This issue is perhaps the least contested issue because the facts are as clear as the position of the law (Section 29 Law of Succession Act). There is only one surviving spouse in this cause. She is said to be advanced in age in her 90s which I do not doubt because though I did not

get the opportunity to see her, I saw her children in court. The surviving widow, Rahab Kainyu Peter and all the surviving children dependants. The position of the law under **Section 29** does not discriminate dependants on account of sex or status. Infact under **Article 27** of the **Constitution** discrimination on account of sex or marital status is prohibited. All the surviving daughters of the deceased whether married or not are in law dependants and are entitled to benefit from the estate like any other child or son.

69. Going by the evidence and submissions by the administrators in this cause this court finds that the following persons are surviving dependants who should benefit from a share in the intestate. This court in arriving at this fact has considered the fact that there are deceased sons of the deceased who left behind families or children residing on the estate and were fully dependant on the estate of the deceased person. It is the finding of this court that they should be considered on the share that would have accrued to the deceased dependant had they not passed on. In the foregoing the following are found to be dependants.

(A) **1st House- Grace Kanoti (deceased)**

- i. Antony Murithi Mukuogo, Annestella Karimi and Rose Kainda (All of who were left behind by Godfrey Mukuogo- late son of the deceased).
- ii. Regina Kaari
- iii. Kenneth Mbae
- iv. Kennedy Munene, Alex Njau, Kevin Kirimi and Dancun Gitungo (on behalf of late Humphrey Kithinji M’Nkiria)
- v. Beth Njeri
- vi. Eustace Kent Nkonge
- vii. Mary Igoki
- viii. Loyford Bundi Njeru

(B). 2nd House- Margaret Kainda Peter (deceased)

- i. Edward Murithi Riungu, Ernest Muchiri, Casty Kanini, Fridah Karimi and Mercy Gaceri (on behalf of the late Edward Riungu)
- ii. Benson Micheni Macpeter
- iii. Mackdonald Kinyua Peter
- iv. Aida Muthoni
- v. Loise Wanja

(C) 3rd House- Rahab Kainyu Peter

- i. Rahab Kainyu Peter (window)
- ii. Petkey Shem Miriti
- iii. Edwin Ndereba
- iv. Hilda Kanini
- v. Rogers Gitari

(D) 4th House- Jane Maitha Njeru (deceased)

- i. Jennifer Muthoni
- ii. Purity Karimi
- iii. Wycliff Gitonga Peter
- iv. Silvia Kainyu

v. Gidlif Mugambi (on behalf of the late Felix Njagi)

70. In regard to the net estate of the deceased in this cause it is the finding of this court that the following assets comprise the net estate herein.

- i. L.R. Magumoni/Thuita/384 Approximately 18 acres or 7.29 ha
- ii. Plot No. 19 Kibugua Market.

The above two assets from the net estate and therefore is available for distribution which brings me to the next issue which is the crux of the matter in this cause

71. **(iii) How should the above estate be distributed among the above dependants/beneficiaries.**

It is quite obvious that the main bone of contention in this cause is how should the estate of the deceased be distributed. The deceased in this cause died in 1980 before the commencement date of the Law of **Succession Cap 160** which Act came into operation on 1st July 1981, Both sides in this cause are quite alive to the provisions of **Section 2(2)** of the **Law of Succession Act** which provide as follows:-

“ The estates of persons dying before commencement of this Act are subject to written law and customs applying at the date of death but nevertheless the administration of their estate shall commence or proceed so far as possible in accordance with this Act.”

72. It is also not contested that the customary law practice of the deceased was Meru Customary Law which provided that estates of deceased persons are divided according to the number of wives or house.

73. What the 2nd to 4th administrators have strongly advanced is that the said customary practice is repugnant to justice, outdated and will result to unfair distribution given that the 4th house will be advantaged on account that they are fewer in number as compared to other houses. On that basis they have preferred that the estate be distributed equally among all the surviving dependants though they have added a rider that the married daughters should not be included and if included they propose that they get a small share – a share that is equivalent to what their respective mothers would have gotten.

74. The application of Customary Africa Customary Law is anchored on **Section 3(2)** of the **Judicature Act** which provide that courts of law;

“ Shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality and shall decide all such cases without undue regard to technicalities of procedure and without undue delay.”

75. The 2nd to 4th administrators have urged this court not to go by the Meru Customary practice because in their view, the practice of distributing the estate according to the number of houses will in the context of the family of the deceased herein, be repugnant to justice as it would lead to inequalities and discrimination.

76. I have considered the 2nd to 4th administrators’ contention in depth and have asked myself whether the practice of distributing the estate according to houses which is a common feature not only in Meru Customary practice but many African Communities really awful, loathsome or repulsive to the people resident within or even outside this County even in this age and era? I do not think so considering the context upon which the 2nd to 4th respondent considers the practice repugnant. The reasons I have come to this conclusion are;

(1) For one going by my finding on who are beneficiaries/dependants to benefit from the estate, the following are actual numbers and figures of what each beneficiary is entitled.

- i. 1st House- Number of unts - 8
- ii. 2nd House- - 6
- iii. 3rd House - 5
- iv. 4th House - 5

The total acreage of the estate approximately 18 acres so if each house is to get equal share each house would get approximately 4.5 acres which means as follows:-

Every beneficiary to get;

- 1st house - 0.56 acre each

2nd house - 0.75 acre each

3rd & 4th house - 0.9 acre

The difference between the first house and 3rd and 4th house is a mere 0.3 acre. Now can that be described as repugnant?

77. Now let us for argument sake say that the question of houses be placed aside and divide the estate into 23 units which reflects the total number of surviving dependants. The simple maths shows that each could get 0.78 which is less than what the 2nd to 4th administrators are recommending. They are recommending that each son get 0.93 acre with daughters getting far less. This proposal in my view is what the same 2nd to 4th Respondents term repugnant and discriminative because the daughters are clearly discriminated and there is no place for such a practice in a modern democratic society.

78. I have also looked at the proposal by the 2nd to 4th administrators and find that subdividing the estate in the manner proposed would be impractical and disorderly. I have looked at the sketch map tendered by the 2nd to 4th administrators and looking at how they have shaded different parts of the estate as per the current occupation on the ground in my view shows that the Petitioner's proposal is both viable and equitable granted it may not be equal to all the beneficiaries but achieving equality with precision at times may be practical and that is why the law provides different scenarios to different persons depending on whether the deceased died polygamous (in which event if the person died after commencement of Law of Succession Act, **Section 40** of the Act would apply) or monogamous (in which event **Section 35 to 38** would apply if deceased died after 1st July 1981). The law strives to achieve equity and that is the guiding principle here.

79. I have looked at the surveyor's report which was done pursuant to the orders of this court and contrary to the petitioners claim the report in my view is not biased. It has not favoured anyone and has given its findings on where parties are utilizing currently. I also find that the surveyor did not recommend a burial site or found any on the ground as alleged by some parties herein.

80. Having considered all the evidence presented, the able submissions made by the learned counsels in this cause and the dictates of the law as observed above I find that the net estate of the deceased in this cause should be distributed according to the number of wives or houses. I am not persuaded that the Meru Customary Law that was in force at the time of the death of the deceased is repugnant or inconsistent with any written law or the constitution in force at that time. I am also not persuaded that this court should rubber stamp the proposal to sell some portions of the estate to 3 of the beneficiaries in this cause because of the obvious illegality of the proposal going by the provisions of **Section 55 and 82 (b)** of Law of Succession Act. In the premises and for the above reasons the grant issued on 16th September 2016 is hereby confirmed and the estate shall be distributed as follows:

A. L.R Magumoni/Thuita/384

i) Eustace Kent Nkonge - 4.5 acres to hold for his benefit and in trust for;

(a) Murithi Mukuongo

Annestella Karimi jointly

Rose Kainda

(b) Regina Kaari

(c) Kenneth Mbae

(d) Kenndy Munene

Alex Njau

Kelvin Kirimi jointly

Duncan Gitungo

(e) Beth Njeri

(f) Mary Igoki

(g) Loyford Bundi Njeru

(ii) Benson Micheni Macpeter

4.5 acres for his benefit and in trust for;

(a) Edward Murithi Riungu

Ernest Muchiri

Casty Kanini jointly

Fridah Karimi

Mercy Gaceri

(b) MacDonald Kinyua Peter

(c) Aida Muthoni

(d) Loise Wanja

(iii) **Petkey Shen Miriti- 4.5 acres** for his benefit and in trust for:

a) Rahab Kainyu Peter

b) Edwin Ndereba

c) Hilda Karimi

d) Rogers Gitari

(iv) **Wycliff Gitonga Peter – 4.5 acres** to hold for his benefit and in trust for;

a) Jennifer Muthoni

b) Purity Karimi

c) Silvia Kanyua

d) Felix Njagi

(B) **L.R. Kibugua Market Plot No.19:**

a) Wycliff Gitonga Peter

b) Eustace Kent Nkonge

c) Benson Micheni Macpeter equal share

d) Petkey Shen Miriti

(C) **L.R. Karingani/Mugirirwa/493:**

Violet Ciamutegi Ndia – whole

This matter involves family members so I make no order as to costs. Each party to bear own costs.

In order to bring this matter to an end, I direct the same surveyor Mr. Ken Opuge to revisit the estate once again this time in the company of the Area Chief and police officers to be availed by Chuka Police Station for purposes of security and as much as practicable carry out subdivision as per the judgment of this court taking into consideration the developments (permanent buildings in order to avoid (as much as it is practicable) moving beneficiaries from their current homes. The sketch map provided by the 2nd to 4th administrators as shaded if it is a true reflection of the ground should provide a useful guide. I further direct that the 4 administrators shall equally meet the surveyors fees. If any party becomes reluctant to pay the surveyors fees in order to frustrate the process, the willing parties can pay and recover costs through execution of those costs before the Deputy Registrar.

Dated, signed and delivered at Chuka this 8th day of October, 2019.

R.K. LIMO

JUDGE

8/10/2019

Judgment signed, dated and delivered in the open court in presence of Mugo the 1st petitioner, Mutitu for 2nd to 4th Petitioner and Kaaria for Interested Party.

R.K. LIMO

JUDGE

8/10/2019