



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 500 OF 2014**

**IN THE MATTER OF THE ESTATE OF KINUTHIA MWAI (DECEASED)**

WANGUI MWAI .....1<sup>ST</sup> PROTESTOR

NDUTA MWAI.....2<sup>ND</sup> PROTESTOR

WANJIKU MWAI.....3<sup>RD</sup> PROTESTOR

VS.

SUSAN KABURA KINUTHIA .....1<sup>ST</sup> RESPONDENT

SIMON MWANGI KINUTHIA.....2<sup>ND</sup>RESPONDENT

MARTIN MUGECHU KINUTHIA.....3<sup>RD</sup>RESPONDENT

JOSEPH NGANGA KINUTHIA.....4<sup>TH</sup>RESPONDENT

GEORGE NDUNGU KINUTHIA.....5<sup>TH</sup>RESPONDENT

JOYCE WAMBUI KINUTHIA.....6<sup>TH</sup> RESPONDENT

ELIZABETH WANJIKU KINUTHIA.....7<sup>TH</sup>RESPONDENT

MARY NDUTA KINUTHIA.....8<sup>TH</sup>RESPONDENT

GRACE WAMBUI KINUTHIA.....9<sup>TH</sup> RESPONDENT

ALICE WANJIRU KINUTHIA.....10<sup>TH</sup>RESPONDENT

HANNAH MUMBI KINUTHIA.....11<sup>TH</sup>RESPONDENT

MARY WANGARI KINUTHIA.....12<sup>TH</sup>RESPONDENT

RACHEAL WAMBUI KINUTHIA.....13<sup>TH</sup>RESPONDENT

ROSE NYAMBURA KITHUTHIA.....14<sup>TH</sup> RESPONDENT

**RULING**

1. The deceased herein KINUTHIA MWAI died intestate on 17.3.2013 and left behind a widow and several children.

2. On 16.9.2014, the widow SUSAN KABURA KINUTHIA was issued with Letters of Administration intestate to administer the estate of

the deceased. She filed a summons for confirmation dated 14.5.2015.

3. The Protestors filed a Summons for revocation or annulment of grant dated 11.2.2015 on the grounds that the properties in question are assets originating from the Estate of MWAI MUGECHHE which the deceased herein KINUTHIA MWAI held in trust for the Applicants.

4. Further, the Protestors stated in the Supporting Affidavit that they have lived on the land and that the Petitioner intends to deny them their share and yet they are entitled to a share of the land as dependents.

5. The parties filed written witness statements which they adopted during the oral hearing of this case. The three protestors WANGUI MWAI, NDUTA MWAI and WANJIKU MWAI said that the deceased herein KINUTHIA MWAI was registered as trustee of the property belonging to their father MWAI MUGECHHE (Deceased) on 8<sup>th</sup> February 1965 after their father died in 1958.

6. OW1, WANGUI MWAI testified that the deceased herein KINUTHIA MWAI took a loan on the parcel LIMURU BIBIRIONI/33 and thereafter without the knowledge or consent of the protestors, he sub-divided LIMURU/BIBIRIONI/33 into 3 parcels on 7.9.1994 as follows:

**(i) LIMURU BIBIRIONI/2187**

**(ii) LIMURU BIBIRIONI/2188 and**

**(iii) LIMURU BIBIRIONI/2189**

7. The Protestors' evidence is that LIMURU BIBIRIONI/33 was held by the deceased herein KINUTHIA MWAI for the beneficiaries of MWAI MUGECHHE (Deceased) who are as follows:

**(i) KINUTHIA MWAI**

**(ii) MUGECHHE MWAI Both deceased**

**(iii) NDUNGU MWAI**

**(iv) NDUTA MWAI**

**(v) WANJIKU MWAI Protestors**

**(vi) WANGUI MWAI**

8. The Protestors also testified that on 22.9.1997, the deceased herein (KINUTHIA MWAI) transferred LIMURU BIBIRIONI/2189 measuring 2½ Acres to NDUNGU MWAI.

9. The Protestors said they have lived on the parcel of land since they returned back to their home after they were briefly married. WANJIKU MWAI resides on LIMURU BIBIRIONI/4007 which was sub-divided from LIMURU/BIBIRIONI/2188 while NDUTA MWAI and WANGUI MWAI reside on LIMURU BIBIRIONI/2187.

10. The Protestors also said the Petitioner intends to disinherit them and yet she has included the wife of their brother MWAI MUGECHHE called ROSEMARY NYAMBURA MUGECHHE (14<sup>th</sup> Respondent) as a beneficiary. They said that ROSEMARY NYAMBURA MUGECHHE had separated with their brother and has come to inherit the property belonging to their father MWAI MUGECHHE (Deceased).

11. The Respondent inherited the properties following the demise of the deceased herein.

12. The Protestors are seeking to be included in the list of the distribution of the properties. They called a witness OW3 NJOROGE NGANGA who said that he attended a dispute between MWAI MUGECHHE and KINUTHIA MWAI (both now deceased) and the Protestors herein who are all siblings which was handled by the chief and the deceased herein KINUTHIA MWAI was told to give the Protestors their share of the land but the deceased did not transfer their share of the land to them until he died.

13. The Petitioner/Respondent did not testify but she called three witnesses as follows: NDUNGU MWAI, FRANCIS MUCHERU NDERU and SIMON GACHAGA JOMO.

14. NDUNGU MWAI who testified as RW 1 said the three protestors were not given any land because they were married and they were with their husbands. He said the Protestors were all married by 1959 and when the sub-division of LIMURU/BIBIRIONI/33 was being done they were not included as they were not at home.

15. He said WANJIKU MWAI has land at GITITHIA within Lari Sub-county and at Ndeiya (5 acres) and that she is married to MWANGI GATETE.

16. He also said NDUTA MWAI is the widow of the late MWARAGU and she has land at ITHANGA within THIKA Sub-county.

17. RW 1 also said WANGUI MWAI married PETER KARUKU and they have land at GITOGOTHI within Limuru Sub-county and at MUNYU within Naivasha Sub-county.

18. RW 1 also said the Protestors are not entitled to the land herein as it belongs to KINUTHIA MWAI (Deceased) and not to the estate of their father.

19. In Cross examination, RW 1 admitted that he got a share of his father's estate from KINUTHIA MWAI (Deceased) after their father had died. He said KINUTHIA MWAI (the deceased herein) transferred the land to him in 1997 and that their father died in 1958.

20. The two witnesses RW 2 and RW 3 also said they knew the Protestors as sisters of KINUTHIA MWAI (the deceased herein) and that the sisters are not entitled to the Estate of the deceased herein as they have their own land.

21. The parties filed written submissions which I have duly considered. I find that it is not in dispute that the three protestors are sisters of the deceased herein.

22. It is also not in dispute that the Properties the subject of this Succession Cause were registered in the name of the deceased herein KINUTHIA MWAI.

23. The issues for determination herein are as follows:

**(i) Whether the deceased held the said properties as a trustee.**

**(ii) Whether the Protestors are entitled to a share of the said properties**

**(iii) Whether the grant herein should be revoked.**

**(iv) Who pays the costs of this Application?**

24. On the issue of whether the deceased held the properties the subject of this suit as a trustee, I find that NDUNGU MWAI who testified as RW1 admitted that he was given his Parcel of land LIMURU/BIBIRIONI/2189 in 1997.

25. I find that this is an admission that the deceased herein KINUTHIA MWAI was holding the properties as a trustee and he was not the owner thereof but the properties belonged to MWAI MUGECHHE (deceased) who was their father.

26. The finding in In **Re Eunice WanjeriNjenga ELC Miscellaneous Civil Suit 62 of 2013 [2013] eKLR** where it was stated:

*“In summary the general duties of trustees in relation to the trust property are to safeguard the assets of the trust, to invest any trust money in his or her hands, and to distribute the assets to the beneficiaries and satisfy any claims of the beneficiaries. With relation to the beneficiaries, trustees are under a duty to maintain equality between beneficiaries and to provide accounts and information to the beneficiaries.”*

27. A similar position was enunciated by the judge in In the Matter of **GW & another (Minors) Environment and Land Miscellaneous Case 197 of 2015 [2016] eKLR**

28. I also find that the 14<sup>th</sup> Respondent ROSEMARY NYAMBURA MUGECHHE is also wife to the brother of the deceased herein MUGECHHE MWAI and this further shows that the Property being distributed belonged to MWAI MUGECHHE (deceased) and not to KINUTHIA MWAI (the deceased herein).

29. I find that there is evidence that the protestors have always resided on the said parcels and that the transfers by the deceased herein were done without their consents and/or knowledge.

30. With regard to inheritance of the parents' property, I agree with what was expressed in the words of Kimaru J in **PETER KARUMBI KEINGATI & 4 OTHERS VS. DR. ANN NYOKABI NGUTHI & 3 OTHERS (2014) EKLR**. His Lordship put it this way;

*“As regards to the argument by the Applicants that married daughters ought not to inherit their parents' property because to do so would amount to discrimination to the sons on account of the fact that the married daughters would also inherit property from their parents' in-law, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would be no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. ...This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which has a tendency of once in a while rearing its ugly head to be forever buried. The ghost has long cast its shadow on our legal system despite numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for those discriminative cultural practices against women be buried in history.”*

31. I am also in complete agreement with Judge Gikonyo, who put it very clearly in the **MATTER OF THE ESTATE OF M'NGARITHI M'MIRITI ALIAS PAUL M'NGARITHI M'MIRITI (DECEASED) [2017] KLR**, regarding the Discrimination of daughters in inheritance;

*From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). And, I am happy to say that from thence, there are many cases- and the number is rising by the day as courts implement the Constitution- which states categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and the Constitution. More specifically I am content to cite the proclamation by the Court of Appeal in the case of **STEPHEN GITONGA M'MURITHI vs. FAITH NGIRAMURITHI [2015] eKLR** that: -*

*“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”*

*Therefore, a son will not have priority over a daughter of the deceased simply because he is male; all- male and female siblings- are equal before the law and are entitled to equal protection of the law. (See article 27 of the Constitution). Accordingly, the 3rd Administrator and her children who are claiming the inheritance of late Festus K. M'Ngaruthi, the son of the deceased are only entitled to the share of their late father. They are not, in the circumstances of this case entitled to more share than the distinct share of each of the two daughters of the deceased simply because the late Festus M'Ngaruthi was the son. The three children of the deceased are entitled to share the net intestate estate of the deceased equally. (All emphasis added)*

32. See also the Judgment of Judge Kasango in **SAMSON KIOGORA RUKUNGA v ZIPPORAH GAITI RUKUNGA [2011] eKLR**

33. I therefore find that there is evidence that the deceased held the properties as a trustee and therefore the Protestors are entitled to a share of the said properties since they are sisters to the deceased herein.

34. I find that the family of NDUNGU MWAI were given their share after their father died but the deceased herein did not give the sisters on the pretext that they were away and therefore not entitled.

35. The Protestors said they filed a suit to claim the same but the suit abated after the deceased herein died. There is also evidence that the issue was arbitrated by the chief and the deceased herein was asked to transfer the Protestors' share to them but he failed to do so until he passed away.

36. On the issued as to whether the grant herein should be revoked, I find that the answer is in the affirmative. The grounds for revocation of grant are entitled in section 76 of the Law of Succession Act as follows:-

**“76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-**

**A. That the proceedings to obtain the grant were defective in substance;**

**B. That the grant was obtained fraudulently by the making of a false statement or by the concealment from court of something material to the case;**

**C. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**

**D. That the person to whom the grant was made has failed ...; or**

**E. That the grant has become useless and inoperative through subsequent circumstances.”**

37. In the current case, the Protestors are entitled to a share of the properties and yet the Petitioner did not involve them or include them in the list of distribution.

38. I accordingly revoke the grant herein and direct that the letters of administration be issued to NDUTA MWAI to represent the Protestors, SUSAN KABURA to represent the family of KINUTHIA MWAI (deceased) and ROSEMARY NYAMBURA MUGECHHE to represent the family of MUGECHHE MWAI(deceased).

39. I further direct that the three administrators namely:

**(i) NDUTA MWAI**

**(ii) SUSAN KABURA**

**(iii) ROSEMARY NYAMBURA MUGECHÉ**

to apply for confirmation of grant within 30 days of issue of the fresh letters of administration.

40. The properties to be distributed to the following beneficiaries:

**1. The family of KINUTHIA MWAI**

**2 The family of MUGECHÉ MWAI**

**3. NDUTA MWAI**

**4. WANJIKU MWAI and**

**5. WANGUI MWAI**

41. This being a family issue, each party to bear its own costs of this application.

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

**ASENATH ONGERI**

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