



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 652 OF 2014**

**IN THE MATTER OF THE ESTATE OF M'MBOROKI M'RACHI (DECEASED)**

**NANCY MWARI DOUGLAS &**

**ANASTACIA CIRINDI IRERI ..... PETITIONER**

**J U D G M E N T**

1. **M'MBOROKI M'RACHI ("the deceased")** to whom this Succession Cause relate, died on 25<sup>th</sup> August, 2005. On 4<sup>th</sup> December 2014, Nancy Mwari Douglas and Anastacia Cirindi Ileri petitioned for letters of administration of the estate of the deceased intestate and set out the following as the survivors of the deceased; **Nancy Mwari Douglas, Anastacia Cirindi Ileri, Teresa Kabwa Mboroki, Catherine Kambura Mboroki, Virginia Mukwanyaga, Japhet Kaaria, Mugambi Kabuuru, Charles Kaburu, Jonathan Nkonge, Jerusah Maringa and Kainda Mboroki.**

2. They also set out parcel numbers **L.R NO. Igoji/Gikui/1283, L.R. NO Igoji/ Gikui/1122, L.R. NO Igoji/Gikui/581** and **Plot No. 3 & 4 Igoji Market** as the assets of the estate.

3. On 2<sup>nd</sup> March, 2015, a grant of letters of administration was issued to Nancy Mwari Douglas and Anastacia Cirindi Ileri. On 17<sup>th</sup> September, 2017, they applied for confirmation of the grant and proposed that the estate be distributed as follows:

**a) L.R. IGOJI/GIKUI/581 measuring 10 Acres**

1. Francis Mugambi Kaburo ..... be given 2.0 Acres
2. Isaac Mutembei Kaburu jointly in equal shares
3. Japhet Kaaria ..... 2. 0 Acres
4. Catherine Kambura ..... ½ Acre
5. Caroline Wanjiru Njenga ..... ½ Acre
6. John Mutembei ..... ½ Acre

**b) L.R IGOJI/ GIKUI/589 measuring 4 ½ Acres** be given jointly in equal shares to the following:

1. Charles Kaburu
2. Jerusah Maringa
3. Kainda Mboroki
4. Mary Kawira
5. Jemima Mboroki

**c) IGOJI/GIKUI/1122 measuring 0.6 Ha** to be given to the following jointly in equal shares:

1. Charles Kaburu
2. Jonathan Nkonge
3. Jerusah Maringa
4. Kainda Mboroki
5. Mary Kawira
6. Jemima Mboroki

d) **IGOJI/GIKUI/1283 measuring 1/8 of an acre** to be given to the following in equal shares:

1. Anastacia Cirindi Ireri
2. Nancy Mwari Douglas

4. On 28<sup>th</sup> November, 2017, the court ordered the administrators to get a letter of introduction from the area Chief, Gikui location, file the search certificates for the properties of the estate and anyone who is opposed to the distribution to file and serve a protest within 30 days. On 28<sup>th</sup> May, 2018, Jonathan Nkonge protested that the estate had not been equally distributed.

5. The issue for determination is whether the proposed distribution of the estate is fair.

6. From Form No P&A 5 and the summons for confirmation, there is a difference in the number of beneficiaries. When the Petitioner appeared in court on the 28<sup>th</sup> May, 2018, she narrated a total of 15 people whom she named as the children belonging to the deceased. In her Supplementary Affidavit in support of the confirmation Summons, **Nancy Mwari**, one of the petitioners set out a total of 20 people as the children of the deceased. In the petitioners' mode of distribution, some of the children of the deceased are not included while grandchildren together with other people whose relationship with the deceased was not disclosed are also included.

7. From the record, it would appear that the deceased had two wives who are now deceased. He had left the following as his children surviving him: -

a) Teresa Kabua Mboroki (widow deceased)

1. Anastasia Cirindi
2. Nancy Mwari Douglas
3. Francis Kaburu (deceased)
4. Japheth Kaaria (unsound mind)
5. Virginia Mukwanyaga
6. Ikuu Mboroki (deceased)
7. Catherine Kabura

b) Grace Gata Mboroki (widow deceased)

1. Florence Kainda
2. Esther Maringa
3. Charles Kaburu
4. Beatrice Kanini (deceased)
5. Margaret Wanja (deceased)
6. Jemimah Nkirote
7. Mary Kawira

8. **Section 40 of the Law of Succession Act, CAP 160 of the Laws of Kenya** (“the Act”) provides for distribution of estates in circumstances where the intestate is polygamous. The estate is to be distributed to the children of the deceased equally with each one of them acting as a separate unit if any of the widows is alive, she is also to be taken as a separate unit.

9. In **Re Estate of John Musambayi Katumanga – deceased [2014] eKLR** W. Musyoka J, held that:-

*“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 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 regardless of the ages, gender and financial status of the children.”*

10. Being guided by the foregoing, I am of the opinion that the application of **Section 40** of the Act will result in equal distribution of the estate among the children of the deceased. There was no claim that any of the grandchildren was a dependant.

11. As already stated, when one compares the names of the children in the mode of distribution provided and the ones stated in court, there is a stark difference. It was not clear of who is who. Secondly, in the mode of distribution provided by the Petitioners, the grandchildren of the deceased have been included without a clear explanation as to whether they were dependants.

12. **Section 29** of the Act provides as to who a dependant is. For the grandchildren of a deceased to be categorized as dependants who are entitled to a share of the estate, it must be shown that they were being maintained by the deceased at the time of his demise. A grand will be entitled to a share in circumstances where a child of the deceased dies leaving a child (grandchild) behind. This is the effect of section 41 of the Act.

13. In **Elizabeth Wairimu Thimba & 2 others v Wilfred Njogu Mbuthia & 2 others [2014] eKLR**, Emukule J held that:

*“In Law of Succession (Law Africa Publishers), William Musyoka expounds on the provisions of Section 41 in terms of the rights of grandchildren at page 102 -*

*“The rule of substitution of a grandchild for his or her parent in all cases of intestacy where the parent dies before the intestate is known as the principle of representation. The law on this is section 41. If a child of the intestate has predeceased the intestate or dies before attaining the age of eighteen years, then that child’s issue alive or en ventre sa mere at the date of the intestate’s death will take in equal shares per stirpes contingent on attaining the age of majority, or if female marrying under that age.*

*The term per stirpes is defined in the Black’s Law Dictionary, 9<sup>th</sup> Ed to mean “proportionately divided between beneficiaries according to their*

*deceased ancestor’s share. “Therefore the grandchildren of the intestate are only entitled to take between them equally the share which their parent would have received had he not predeceased the intestate but on condition that at the time of his death whether before or after the intestate, he had attained eighteen years or if female, married under that age. Therefore, reasonable provision as per the law refers to an equal share of what their parent’s portion would have been.”*

14. Consequently, it would be unfair to warrant a distribution where all beneficiaries have not been provided for. In this regard, I direct that the court will take further evidence on the actual children of the deceased identifying those who have died and the children they have left behind before it can distribute the estate.

**DATED and DELIVERED** at Meru this 5<sup>th</sup> day of July, 2018.

**A. MABEYA**

**JUDGE**