



**REPUBLIC OF KENYA**

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

**ORIGINATING SUMMONS NO. 19 OF 2017**

**IN THE MATTER OF THE ESTATE OF ELIJAH KURIA (DECEASED)**

**NANCY NJERI KURIA.....PLAINTIFF**

**-VERSUS-**

**EDWARD W. KURIA.....RESPONDENT**

**JUDGEMENT**

**NANCY NJERI KURIA**, the applicant filed this Originating Summons dated 5<sup>th</sup> December, 2017 in which she sued the respondent Edward Kuria claiming that she was to be a beneficiary of half an acre of land out of the Estate of their father Elijah Kuria but ended up with an allocation of ¼ acre of the Estate.

In the Summons which has been brought pursuant to Order 37 Rule 1, 2, 14 and 18 of the Civil Procedure Rules and Section 3A and 69 (e) of the Civil Procedure Act. The Applicant seeks the following Orders:

- (1) Whether the Plaintiff as the deceased's daughter is entitled to an equal share of the deceased's estate just like other beneficiaries***
- (2) Whether the Plaintiff's mother is entitled to a share of her deceased husband's estate and whether the Honourable court can order that she be given her share of the estate.***
- (3) Whether the Plaintiff is supposed to share her share of the estate with her mother***
- (4) Whether the estate of ELIJAH KURIA (Deceased) was shared in accordance with the law of succession***
- (5) Whether the Honourable court can order redistribution of the estate to ensure fairness and equity.***

In support of the claim Nancy Njeri Kuria has annexed her own affidavit which lays the background of the matter and the basis upon which this court should grant the orders sought.

In the affidavit as deposed by Nancy Kuria and in her own testimony in court she claims that the administrators failed to notify her of the pending confirmation proceedings pending determination before court.

According to her evidence the respondent thereafter distributed the property without her consent nor did they adhere to the equality principle in dividing the property amongst the rest of the siblings.

In answer to the questions from Mr. Mutuma for the respondent, the applicant confirmed that she did not know exactly the measurement on the ground with respect to LR Ngong/Ngong/3906. Her main dispute was that she did not get her entitlement of ½ an acre and the respondent seems to have discriminated against her during the distribution.

On his part the respondent **EDWARD KURIA** opposed the claim by filing a detailed replying affidavit dated 5/2/2018 and further presented *viva voce* evidence on the matter. In his response to the summons Edward Kuria testified that indeed a family meeting had taken place on 1/12/2016 on how to divide the Estate among the beneficiaries. Further, Edward Kuria told this court that the nature and mode of distribution was also taken into account. The sale of some portion to cater for the legal expenses that will be incurred in the whole process of adjudication of the estate. That despite an agreement to appropriate ½ an acre to the applicant when the actual measurements were taken on the ground it was discovered there exist an anomaly on the said parcel of land. According to his evidence there was variance between the acreage indicated in the title and the physical portion on the ground. Further, in Edward Kuria testimony this variance occasioned the non-implementation of the family meeting resolution on distribution of the Estate to the letter rendering each beneficiary to secure less the earlier portions agreed.

According to the testimony and evidence in court the respondent testified that besides the applicant losing on ¼ acre with regard to LR Ngong/Ngong/3906, she was allowed a piece of land measuring more than 2 acres in Elementaita.

The administrator upon request of this court has also attached an inventory and accounts to the Estate of the late Elijah Kamau Kuria filed in court on 19/7/2018. The scheme of the distribution of the assets was indicated to be as follows:

- Nancy Njeri Kuria
- Edward Njoroge Kuria
- Joseph Mwai Kuria Particulars withheld
- Road Reserve and Grades
- Moses Onyango (a Purchaser)

Liabilities incurred and payable by the Estate

I have considered the applicant's affidavit and the response by the respondent together with their respective testimonies in court.

Following on the dispute of ¼ portion which was not allotted to the applicant it is clear that the applicant thinks that the respondent sufficiently failed to honour the family agreement on the mode of distribution which ended up disinheriting her of ¼ of an acre of the land. The burden of proof is on the applicant to show that there was an intentional conduct on the part of the respondent to breach the agreement in the mode of distribution and as a natural consequence she lost ¼ of an acre of her initial entitlement.

### **Analysis and Resolution**

The law of Intestacy under our Act Cap 160 has clearly determined what is to happen to the property that is not disposed of by the will. Sections of the law 35, 36(2), (3) 5 and 38 of the law of succession caters for the rights of the children in intestate succession. According to section 38 it provides as follows:

***“Where an intestate has left a surviving child, or children but no spouse, the net intestate 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 the matter of the Estate of **Patrick Mungai Kugega (Deceased) referred as High Court Succession Cause Number 1344 of 2000 Koome J** as she then was, clearly stated as follows in regard to the application of section 38 of the Act held inter alia that : ***“Section 38 was explicit that the Estate of the deceased intestate who is survived by the children only should be shared between the children in equal shares.”***

So far as the share properties of section 38 of the Act are concerned Angawa J in the case of the **Estate of Ellah Nthawa Nairobi Succession Cause No. 971 of 2001** held as follows:

***“Where an intestate is survived by children but no spouse, the Estate is to be shared equally by the surviving children. The application of the doctrine on equal distribution can sometimes be defeated depending on the circumstances of the Estate. A court faced with a confirmation application where apportionment is not with the law should reject it, and require the parties to move the court again after complying with the applicable law.”***

It was not in dispute that the applicant's contention seems to fall within the provisions of Article 27 of the Constitution which outlaws any open discrimination on the grounds of gender, sex, colour, marriage or status. For purposes of achieving equity in the distribution, the applicant contends that it was necessary that the respondent did not have reason to wither her share by reducing it to a quarter of an acre.

As regards the respondent's answer LR Ngong/Ngong/3906 initially was known to measure approximately two acres. That upon evaluating and scrutinizing the acreage on the ground it came to be confirmed as 0.777 Hectares.

According to his evidence it was found necessary to taper with the initial agreed portions based on the new measurements. In the interest of the administrator of the Estate the respondent deposed that they made portions and vested further two acres of land referred as Rare/Tatu/Block 1/0839 for the benefit of the applicant. As stated in section 38 of the law of succession I agree fully with the principle of equal distribution amongst the children of the Estate whether married, unmarried or may it be sons or daughters of the deceased there shall be no open discrimination which runs contrary with article 27 of the Constitution.

I have considered the materials and evidence presented by both parties to the dispute. As much as I agree with the provisions of section 38 of the act the Estate in question is that LR Ngong/Ngong/3906 initially envisaged to be 2 acres was finally confirmed to measure 0.777 Ha on the ground. The court has further scrutinized the probate account filed by the respondent. The deceased Estate upon confirmation of the Grant of Letter of administration has been fully distributed including settling liabilities.

My other problem would be who among the children of the deceased would cede his share so as to entitle the applicant a quarter share in order to achieve equal distribution provided for under section 38 of the act.

I am of the view that upon determination of the deceased Estate and the certification of the initial total acreage found to be less than what the family thought was actual measure of 2 acres. It is therefore not in conformity with the certificate of title. For this court to comply with Section 38 of the Act the entire confirmation proceedings must be re-opened and fresh distribution commenced. The circumstances of this

case in my view, do not demand the court to take that route on equal distribution of this property which cannot be practically achieved. With respect to the applicant assertion, any sub-division of immovable property as of necessity takes away some portions to create access or easement and grave site for the sole benefits of the beneficiaries. The very aspect of survey and sub-division does reduce the total acreage of land. The other relevant consideration in this dispute is in regard to property referred as Elementaita land which devolved upon administration and distribution to the applicant. In the instant case a Road Reserve and grave site has taken a whole of 0.10 Ha from the total unit of measure of 0.774 Ha.

On the preponderance of evidence in this case, achieving equal shares in a property of this nature as observed from the probate account and certificate of title cannot apply. One of the most striking factors of the applicants cause of action is its lack of flexibility even when clear facts have been pleaded laying the basis why equal distribution was not tenable. It appears to me that even in equal share principle any fundamental characteristics of the property for purposes of expediency and adaptability can be varied to tackle novel challenge which is likely to impact that ability of the best outcome on distribution. The peculiar circumstances of a family unit should not complicate the application of the rules of equality. Having come to the foregoing conclusion and in the circumstances of this case the family property as distributed to the heirs by the respondent did not enrich him or other children unfairly nor did he use his position to serve his own interest.

In my view like a trustee he did not act contrary to the trust placed upon him of discriminating against the applicant on account of sex or gender. I agree with the defendant that by vesting the Elementaita share for the benefit of the applicant it did compensate her for any inequality suffered in the total distribution of Ngong/Ngong/3906. It is trite law that intestate share of the deceased surviving children as the case may be are deemed entitled to their equal share in the property. However, the court should not lose sight that in certain cases it may not be practical in every situation to meet the legal threshold. It was unfortunate that in devolving the equal share the applicant had to suffer some loss of a portion in Ngong/Ngong/3906 but the court finds that in overall she retained the Elementaita property.

The failure by the respondent not to comply with section 38 of the Act did not result in any act of discrimination against the applicant. For all these reasons the applicants protest lacks merit both in substance and form.

Accordingly, Originating Summons dated 5/12/2017 be and is hereby dismissed for want of merit. I make no orders as to costs.

**Dated, delivered and signed in open court at Kajiado this 15<sup>th</sup> day of October, 2018.**

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**R. NYAKUNDI**

**JUDGE**

**Representation**

Ms. Miencha Holding Brief for Mutuma for the Defendant

Mr. Moseli for the applicant - Present