



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MURANG'A**  
**SUCCESSION CAUSE NO. 450 OF 2013**  
***RE ESTATE OF MACHARIA MBUTHIA (DECEASED)***  
**ZACHARIA MUHORO MACHARIA "A".....PETITIONER**  
**VERSUS**  
**ZACHARIA MUHORO MACHARIA "B" .....PROTESTOR**  
**JUDGMENT**

1. Macharia Mbuthia (hereafter *the deceased*) died *intestate* on 19<sup>th</sup> November 1994. A dispute has arisen over the *distribution* of his free estate.
2. The deceased was *polygamous*. The petitioner was born in 1945 in the first house. His mother was *Beatrice Wanjiru*. She is also deceased. He testified that he is the only surviving child in that house.
3. The protestor is his *step-brother*. They share common names. That is why the pleadings describe them as "A" and "B" respectively. The protestor's mother was *Gachambi Macharia*. She is also deceased.
4. The deceased left one property: *Loc 2 Mariira/175*, a piece of land measuring 6.5 acres or thereabouts. A certificate of official search is annexed to the summons.
5. The petitioner testified that the deceased *instructed* him to sub-divide the land as follows: The protestor to get 2¼ acres; the petitioner 1½ acres; Elizabeth Njoki (wife to his late brother Njoroge) 1½ acres; and, lastly, the estate of his late brother Tirus Kinungi 1¼ acres. That is the proposed mode of distribution in the summons for confirmation of grant which he filed on 24<sup>th</sup> January 2011.
6. The protestor on the other hand relied on his *affidavit of protest* sworn on 20<sup>th</sup> November 2013. He stated that the deceased was survived by the following children from the 1<sup>st</sup> house-
  - a. Zacharia Muhoro Macharia "A" (son)
  - b. Elizabeth Njoki (daughter-in-law)
  - c. Tirus Kinungi (son, who died in 2017)
  - d. Wambui Macharia (daughter-in-law)

7. However the protestor did not lead evidence on the status or relationship of Wambui Macharia to the deceased. I also note that she is not listed as an heir in the summons for confirmation of the grant. I find that the only true heirs from the 1<sup>st</sup> house are the persons listed as (a) to (c) in the preceding paragraph.

8. The children from the 2<sup>nd</sup> house are the following-

- i. Wanjiru Macharia (daughter, deceased)
- ii. Waithira Macharia (daughter, deceased)
- iii. Nyambura Macharia (daughter, deceased)
- iv. Muringi Macharia (daughter, *whereabouts unknown*)
- v. Wambui Macharia (daughter)
- vi. Wanjiku Macharia (daughter)
- vii. Zacharia Muhoro Macharia “B” (son)

9. The protestor denied that his father made his wishes known to the petitioner. He proposed that the estate be divided *equally* among all the 11 children above.

10. He also clarified that one of his deceased sisters, *Wanjiru Macharia*, has children. His other sister, Muringi Macharia *disappeared*. I thus find that the only true heirs from the 2<sup>nd</sup> house are those listed as (i), (v), (vi) and (vii) in paragraph 8 above.

11. I will now turn to the alleged *oral will*. The petitioner did not say when the wishes of the deceased were expressed. How many months prior to his death was it? There were *no* independent witnesses. Clearly, the conditions precedent and antecedent to a valid oral will were *not* proved. See *Re Rufus Ngethe Munyua (Deceased) Public Trustee v Wambui* [1977] KLR 137.

12. If the property is divided as proposed by the petitioner, the 1<sup>st</sup> house would end up with a *bigger* portion of 4¼ acres. The 2<sup>nd</sup> house would only receive 2¼ acres. But also hidden from view is that the petitioner would get the additional portion for his younger brother Tirus Kinungi who has since passed on.

13. The protestor’s recommendation is equally unjust: Four of his sisters are dead or cannot be traced. If the property is divided equally among all the eleven children the 2<sup>nd</sup> house would retain the lion’s share; and, most of it in the hands of the protestor.

14. The true heirs are now clear. The sole asset is also known. The two widows are also deceased. Since the deceased was *polygamous* and died *intestate*, section 40 (1) of the Law of Succession Act applies. It provides-

“40 (1) Where an intestate has married more than once under any system of law permitting polygamy his personal and household effects and the residue of the net intestate shall in the first instance be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”

16. Section 40 does not however take away the discretion of the court to distribute the estate fairly. See *Rono v Rono & another* [2008] 1 KLR (G&F), [2005] 1 KLR 538 at 553.

16. Furthermore, sections 26 and 29 of the Law of Succession Act do *not* discriminate between sons and daughters; or, even *married* daughters. See *Re Estate of Simeon Kuria Kamau* High Court, Eldoret

Succession Cause 218 of 1997 (unreported), *Re Estate of Hellen Muthoni Karanja*, High Court, Eldoret  
Succession Cause 180 of 2006 [2015] eKLR

17. The upshot is that the estate of the deceased shall in the first instance be divided *equally* between the *two houses* of the deceased. 3¼ acres shall go to the *first house* and devolve in *equal shares* to Zacharia Muhoro Macharia “A” (petitioner); Elizabeth Njoki (daughter-in-law); and, the estate of Tirus Kinungi (a son who died in 2017).

18. The remaining 3¼ acres shall go to the *second house* and devolve in *equal shares* to the estate of Wanjiru Macharia (daughter, deceased); Wambui Macharia (daughter); Wanjiku Macharia (daughter); and, Zacharia Muhoro Macharia “B” (the protestor)

19. The grant shall be *confirmed* in terms of this judgment. In the interests of justice, there shall be *no* order on *costs*.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **MURANG’A** this 4<sup>th</sup> day of October 2018.

**KANYI KIMONDO**

**JUDGE**

***Judgment read in open court in the presence of:***

Petitioner (in person)

Protestor (in person)

Ms. Dorcas and Ms. Elizabeth, Court Clerks.