



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.196 OF 2004**

**IN THE MATTER OF THE ESTATE OF M'IMWERE NDONGE (DCEASED)**

**JOSEPH M'MUKIIRI.....PETITIONER**

**VERSUS**

**ELIJAH MUKIIRI M'IMWERE.....1<sup>ST</sup> PROTESTOR**

**LYDIA GATUMWA IKIUGU.....2<sup>ND</sup> PROTESTOR**

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

1. **M'IMWERE NDONGE (the deceased)** died interstate on 8<sup>th</sup> March, 1980. He was married to two wives and left behind five children, namely, **Joseph Mukira M'Mwere (petitioner), Esther Rigiri, Silas Mugambi, Elijah Mukiri and Florence Kairuthi**. He also left behind the property known as **Thimbiri/Igoki/22**.
2. On 23<sup>rd</sup> April, 2004, the petitioner petitioned for grant of letters of administration which was issued to him on 15<sup>th</sup> October, 2004. The grant was revoked on 17<sup>th</sup> July, 2017 whereby the petitioner applied for the reinstatement and confirmation thereof vide Summons dated 13<sup>th</sup> April 2018. He also sought for an order of confirmation.
3. The court reinstated the grant and the petitioner gave his preferred mode of distribution. On 4<sup>th</sup> September, 2018, **Elijah Mukiri M'IMwere and Lydia Gatumwa (the perotestors)** filed their protest wherein they rooted for the estate property to be distributed equally among all the beneficiaries.
4. The protest was determined through viva voce evidence. **PW1 Elijah Mukiri** testified that the mode of distribution proposed by the petitioner was not fair as he had included his sons who were not beneficiaries of the estate. That the deceased had two wives; Martha Kabit and Janet Karuke. He proposed that the estate to be divided equally among the children of the deceased. He disclaimed the agreement for distribution of the estate relied on by the petitioner for the reason that the petitioner would get a bigger share than everyone else.
5. In cross-examination, he admitted that, before the deceased died, he had showed the two wives where to farm. That both the mother of the petitioner and his mother had separate places, where they were cultivating within the estate land but he did not know how much land each family occupied.
6. **PW2 LYDIA GATUMWA IKIUGU**, daughter in law to the deceased, told the court that her husband had died leaving her with 3 children. That she did not know the acreage that she was to get pursuant to the agreement marked as **"JM1"**.
7. **RW1 JOSEPH MUKIIRA M'IMWARE** told the court that the total acreage of the estate property was 5.30 acres. That the deceased had divided his land between the two houses way back in 1968. That the estate should be distributed in terms of the houses and not children. That he should get a bigger portion as he had incurred expenses in this succession cause.
8. After the parties had testified, the court asked both **FLORENCE KAIRUTHI** and **ESTHER RIGIRI**, daughters of the deceased whether they had any claim in the estate. They answered in the affirmative.
9. The only issue for determination is; **how should the estate be distributed?**
10. **Section 2 of the Law of Succession Act (the Act)** provides as follows: -

***"2(1). Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the Law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates***

*of persons dying after the commencement of this Act and to the administration of estates of those persons.*

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

11. In the present case, the deceased died in 1980 which was before the commencement of the Act in 1981. Thus, the law applicable would be customary law. In this regard, the Meru custom. This is documented in **Eugene Cotran’s Restatement of African Law: Kenya II the Law of Succession** wherein it is stated at page 35 thus:-

*“The Meru custom with regard to land is that: each house keeps that land which was allocated to it during the husband’s lifetime. The portion cultivated by the deceased himself during his lifetime goes to the person who buried him. If the wife died, the property that she held would go to the person that buried her so that the rest of the property is shared equally among the sons. If there was any land that was divided, it will be taken into account to ensure that there is equality among the sons taking into account the lifetime allocation. Daughters do not share in land”*

12. However, applying the Meru custom at this time and age would be unconstitutional. **Article 27 of the Constitution** outlaws any form of discrimination. In this regard, I will restrain myself from applying the Meru custom since it bars the daughters of a deceased person from inheriting his property. It will therefore be difficult for me to apply only a portion of that Meru custom by dividing the land between houses, while I ignore the discriminative part.

13. I am alive to the testimonies of the parties that the deceased had put his two wives on separate places in the estate land where the wives were cultivating during the lifetime of the deceased. That their respective children have continued to cultivate the portions that their respective mothers were using.

14. The agreement entered by the parties on 2<sup>nd</sup> May, 2018 is suspect and not binding. Firstly, what was the necessity for that agreement? Secondly, the excuse that the petitioner was to get a bigger share because he had been put to expense in the filing and prosecution of this Succession Cause does not hold. Ordinarily, the expenses of administration of an estate is to be borne by the estate. It is an expense to be shared equally by those inheriting from the estate.

15. Since each and every child of the deceased is a beneficiary of the estate, and since each of them wishes to have a share thereof, I order that the estate be distributed equally amongst all of them as follows: -

**NTIMBIRI/IGOKI/22**

- a) Joseph M’Mukira M’Imwere - 1.08 acre
- b) Elijah Mukira M’IMwere - 1.08 acre
- c) Lydia Gatumwa Ikiugu - 1.08 acre
- d) Esther Rigiri - 1.08 acre
- e) Florence Kairuthia - 1.08 acre

16. This being a family matter, I will not make any order as to costs.

**SIGNED** at Meru me: -

**A. MABEYA**

**JUDGE**

**DATED** and **DELIVERED** at Meru this 6<sup>th</sup> day of December, 2018.

**F.K. GIKONYO**

**JUDGE**