



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**SUCCESSION CAUSE NO. 473 OF 2011**

**In the Matter of the Estate of M' Raiji Ndethiu (Deceased)**

BENJAMIN NJERU M' RAIJI.....APPLICANT

Versus

ANTHONY NJAGI NJERU.....PETITIONER/RESPONDENT

**JUDGMENT**

[1] On 21<sup>st</sup> February 2012, this court:-

**(1)Revoked the Grant of Letters of Administration of the deceased estate which had been made to the Petitioner by Principal Magistrate's Court Chuka in Chuka PMCC NO. 105 of 2008; and**

**(2)made a fresh Grant to the Applicant and the Petitioner jointly.**

Subsequently, the Applicant and the Petitioner filed separate modes of distribution of the deceased's estate for determination by court. The court also directed that *viva voce* evidence be adduced on distribution of the estate. I will analyze the modes of distribution as proposed by the parties herein and make a determination.

**Proposal by the Petitioner**

[2]The Petitioner has proposed the estate to be distributed as follows:

**L.R NO. MUTHAMBI/CHAMUNGA/330**

**-ANTHONY NJAGI NJERU.....2.20 ACRES**

**-BENJAMIN NJERU M' RAIJI.....1.80 ACRES**

**L.R NO. MUTHAMBI /CHAMUNGA/513**

**-BENJAMIN NJERU M' RAIJI and M' Ndereba Mutegi M' Raiji-equal shares**

**Proposal by the Applicant**

[3]The Applicant on the other hand proposed the estate properties to be distributed as follows:

**L.R MUTHAMBI/CHAMUNGA/513**

**-ANTHONY NJAGI NJERU (Grandson)-0.5 Acres**

**-BENJAMIN NJERU M' RAIJI (Son)-2.575 Acres**

**-M' NDEREBA M' RAIJI (Son)-2.575 Acres**

**L.R NO. MUTHAMBI/CHAMUNGA/330**

**-BENJAMIN NJERU M' RAIJI (Son)-2 Acres**

**-M' NDEREBA M' RAIJI (Son)-2 Acres**

**ORAL EVIDENCE ADDUCED**

**By Applicant**

[4] Both parties testified and filled witness statements in support of their respective cases. PW1, Benjamin Njeru testified that the petitioner was his nephew being his sister's son. He adopted his witness statement filed in court on 24<sup>th</sup> February 2013. It was his evidence that the estate of the deceased comprised of the following parcels:

**1. L.R NO. MUTHAMBI/CHAMUNGA/330 measuring approximately 4 Acres**

**2. LR. NO. MUTHAMBI /CHAMUNGA/513 measuring approximately 5.65 Acres**

It was his further evidence that the reason he was proposing that Petitioner gets half an acre was because he and his brother had their own children whom they were going to divide the land to.

[5] PW2 M' Ndereba M' Raiji a brother to PW1 supported the proposal by PW1. In his witness statement, he stated that they had proposed to give the Petitioner herein half an acre because he was a grandson of the deceased and that further he had other children whom he was going to divide the land to.

[6] Likewise, Terecia Kathure and Maria Ukima Nyaga both daughters of the deceased associated themselves with the proposal and sentiments expressed by their brothers PW1 and PW2 to the effect that the Petitioner should get half an acre of the suit property. They also stated that they did not wish to get a portion of their fathers estate.

**By Petitioner**

[7] The Petitioner's evidence on the other hand was that he had lived on **L.R NO. MUTHAMBI/CHAMUNGA/330** since childhood and that he did not know any other land which he could call home. He also testified that he had been utilizing the said land and working on a portion measuring 2.20 Acres while the Applicant utilized the other portion measuring 1.80 Acres. He stated that PW2 who is his uncle does not occupy any part of the suit property; he has no property thereon as he lived on another ancestral land measuring 7 Acres being L.R NO. **MUTHAMBI/CHAMUNGA/358** belonging to his late grandfather.

[8] Mbiuki Chabari testified that the Petitioner was his nephew and that L.R NO. MUTHAMBI/CHAMUNGA/ 330 and 513 belonged to the deceased and that both the Applicant and the Petitioner have their homes in L.R NO. MUTHAMBI/CHAMUNGA/330 which is ancestral land. His further testimony was that the Petitioner had built a permanent house on the said parcel L.R NO. MUTHAMBI/CHAMUNGA/ 330. In addition, he stated that the Applicant had since sold part of the family land. He further contended that L.R NO. MUTHAMBI/CHAMUNGA/513 was ancestral land which belonged to the deceased and that the same should be shared equally between the Petitioner and

Ndereba M' Raiji.

[9] Germano Mundi Titus supported the Petitioner's case contended that the parties in this cause were his clansmen. He stated that the Petitioner had since his childhood lived on L.R NO. MUTHAMBI/CHAMUNGA/330 and that he had developed it.

[10] Saberina Mumu an eldest daughter of the deceased filed a statement in which she stated that her father was the owner of the suit properties but which were ancestral lands. She stated further that her father had given a share of LR NO. MUTHAMBI/CHAMUNGA/330 to the Petitioner and marked the part where the Petitioner had settled; and that he has all of his lifetime lived on the said parcel of land. Consequently she contended that LR NO. MUTHAMBI/CHAMUNGA/330 should be shared equally between the Petitioner and the Applicant.

[11] Anniceta Changu Miriti daughter of the deceased, a sister to the Applicant and mother to the Petitioner stated that her son had all along lived on the disputed property which was ancestral land and that he had developed it. Consequently, she contended that the land should be shared equally between the Applicant and the Petitioner.

### **Submissions**

[12] The Applicant submitted that it was not in dispute that the Applicant was the deceased's son while the Petitioner was the deceased's grandson and that it was not in dispute that the deceased was survived by 6 children 4 of whom were married daughters and who had waived their interest in the deceased's estate and had opted to support the opposing parties herein. It was further submitted that a grandchild could not hold an independent right, equal to the deceased's son as that would create inequality in distribution when considering alongside the fact that the deceased had many children surviving him and who had families. Consequently, it was submitted that it was only fair for the deceased estate to be distributed to the two sons who would then share the same to their respective children.

[13] On the other hand it was submitted for the Petitioner that he had lived on L.R NO. MUTHAMBI/CHAMUNGA/330 and that he had been utilizing the said land on a portion measuring 2.20 Acres and that the Petitioner had been utilizing the remaining 1.80 acres and that he had itemized the developments which he had one on the same. Consequently, he submitted that in view of the evidence on record he urged the court to find that the Petitioner's mode of distribution was fair, equitable and just in the circumstances and adopt the same.

### **DETERMINATION**

[14] I have carefully considered the opposing modes of distribution proposed by the parties, the evidence on record and the submissions by the parties. It is not in dispute that the Applicant and the Petitioner are son and grandson of the deceased respectively. It is also not in dispute that both the Petitioner and the Applicant live on LR NO. MUTHAMBI/CHAMUNGA/330. Further, it is not in dispute that the Petitioner had lived on this land since he was born and that he had built a permanent house on the said land; this was admitted by both parties. Another important fact is that the Petitioner's mother Anniceta Changu (DW5) recorded a witness statement in support of her son (the Petitioner) but it appears that she was not interested in and was not claiming a share in her father's estate. Again, the Petitioner is claiming a share of the estate of the deceased in his own right as a grandson of the deceased. The evidence before the court shows that both the Petitioner and the Applicant lived on LR NO. MUTHAMBI/CHAMUNGA/330. More specifically, the Petitioner has lived on the said land since he was born, therefore, a dependant of the deceased within the meaning of Section 29 of the Law of Succession Act with right of inheritance. In addition, the Petitioner built a permanent house thereon. The Applicant has, however, proposed to remove the Petitioner from L.R MUTHAMBI/CHAMUNGA/330 and take him to a ½ acre in L.R MUTHAMBI/CHAMUNGA/513. This effectively, removes the Petitioner from his permanent house and from the only land he has known as home. This in my view would be manifestly unjust and unfair to the Petitioner. I will not therefore, move him to parcel number 513 as suggested by the Applicant. But, I do not think the Petitioner, who is a grandson of the deceased

would be entitled to equality in the sharing of the estate with the sons of the deceased. Accordingly, he would be entitled to a specific provision which the court will have to determine. Now, the question would be what is the specific share of the estate that would be reasonable for this dependant? In making this order, I will fall back to my discretion under Section 27 of the Law of Succession Act CAP 160 of the Laws of Kenya which provides as follows:

***In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant,...and to impose such conditions, as it thinks fit***

[15] The Petitioner appeared to be contradicting himself. At one point, in his affidavit in support of the Summons for Confirmation of Grant, he made a quest for a specific share in parcel number L.R NO MUTHAMBI/CHAMUNGA/330 to wit **2.20 ACRES**. He also proposed that the Applicant to get **1.80 ACRES** from that land. He stated that this is the specific area each has been occupying. At other time, in his submission, he proposed the subject land to be distributed equally between him and the Applicant. I do not find any evidence to show that he occupied 2.20 acres. I also noted that following the order of preference and inheritance, the Petitioner should not share in priority or equality with the sons of the deceased. Therefore, to give him 2.20 acres in the absence of evidence which brings conviction upon the court that the deceased settled him on 2.20 acres would not only be most unfair to the sons of the deceased but contrary to the law and against the weight of evidence adduced. Thus, taking into account the totality of all the circumstances of this case, the evidence on record, exercise of my discretion dictates and I hereby direct that the estate of the deceased shall be distributed as follows;

**(1) L.R NO.MUTHAMBI/CHAMUNGA/330**

**(i)Anthony Njagi Njeru.....1 Acre**

**(ii)The balance will be shared equally between Benjamin Njeru M' Raiji and M' Ndereba M'Raiji**

**(2)L.R NO. MUTHAMBI/CHAMUNGA/513,**

**As there is no dispute on this property, it will be shared equally between Benjamin Njeru M' Raiji and M' Ndereba M' Raiji.**

[16] This being a succession, I order that each party shall bear own costs.

**Dated, signed and delivered in open court at Meru this 22<sup>nd</sup> day of**

**February 2017**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Kiogora advocate for Petitioner .

Petitioner – present

Mr.Mburugu advocate holding brief for Mr. Kaimenyi for protestor.  
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**F. GIKONYO**

**JUDGE**