



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**SUCCESSION CAUSE NO 458 OF 2011**

**In the matter of the Estate of Samwel Mithia M'Rimbere alias Samuel Ithia Rimbere alias Samuel M'Ithia M'Rimbere (Deceased)**

**ISABELLA GACHERI M'ITHIA.....PETITIONER**

**And**

**MARY NKATHA.....1<sup>ST</sup> PROTESTOR**

**FLORENCE KENDI.....2<sup>ND</sup> PROTESTOR**

**JUDGMENT**

**Distribution of intestate estate**

[1] By a Summons for Confirmation of grant dated 22<sup>nd</sup> April 2013 the Petitioner applied for confirmation of grant issued to her on 11<sup>th</sup> April 2012. She proposed that the estate of the deceased be distributed as follows:-

**1. L.R NO NTIMA/IGOKI/7766- approximately 0.028 Ha**

**a. Florence Kendi and**

**b. Mary Nkatha.....to own jointly**

**2. L.R NO NTIMA/IGOKI/7767- approximately 0.28 Ha**

**a. Evangeline Ntinyari S. M'Ithia**

**b. Rose Makandi Kithia**

**c. Erick Kithinji Gitonga and**

**d. Douglas Gikundi Mithia...to own jointly in equal shares**

**3. L.R NO NTIMA/IGOKI/7768- approximately 0.51 Ha**

**a. Isabella Gacheri S. M'Ithia...whole**

**4. L.R NO KIIRUA/NAARI/333**

- a. Mary Nkatha.....1 acre
- b. Evangeline Ntinyari S. M'Ithia.....1 acre
- c. Erick Kithinji Gitonga M'Ithia.....2 acres
- d. Douglas Gikunda M'Ithia.....2 acres
- e. Florence kendi.....1 acre
- f. Nancy Kagwiria Mwirigi.....1 acre
- g. Martin Kimathi M'Ithia.....1 acre
- h. Rose Makandi Kithia.....1 acre
- i. Kennedy Muriungi M'Ithia.....1 acre
- j. Isabella Gacheri S. M'Ithia.....balance

[2] But, a protest was filed on 19<sup>th</sup> May 2014 by Mary Nkatha and Florence Kendi. In confirmation proceedings the court should hear each protestor and interested party before making its final order. See rule 41 of the Probate and Administration Rules. I will, therefore, consider the protests herein. On 27<sup>th</sup> September, 2016, with the consent of the parties, the court varied the directions given on 21<sup>st</sup> May 2014 and instead directed that the protest shall be canvassed by way of written submissions. Parties filed submissions on the protest and distribution which I shall consider. I will also consider the affidavits filed as well as issues formulated to be in controversy.

### **Issues**

[3] The Petitioner framed and the Protestors adopted the following to be the three issues in controversy:-

- (a) Whether shares of Erick Kithinji Gitonga M'Ithia and Douglas Gikunda M'Ithia in L.R NO KIIRUA/NAARI/333 should be reduced from 2 acres to 1.5 acres each**
- (b) Whether Kennedy Muriungi M'Ithia is entitled to any share in the estate; and**
- (c) Whether the deceased had shares in Standard Chartered Bank, Barclays Bank of Kenya, Ntimi Nyakiru Society and Miriga Mieru Housing Society and who should be entitled to them**

### **The protest**

[4] The protestors' main point of contention is that the mode of distribution omitted some beneficiaries to wit;

- (a) Kennedy Muriungi who is the grandson of the deceased, but also a dependant for he was educated and brought up by the deceased on and continues to live on the deceased's property;
- (b) Daughters of the deceased, namely Nancy Kagwiria Mwirigi and Rose Makandi Kithia were not provided for in deceased's plots and main land respectively.

[5] The protestors, therefore, proposed that the estate property be distributed as follows:-

#### **1. L.R NO NTIMA/IGOKI/7766**

**1. Erick Kithinji**

**2. Douglas Gikunda.....to own jointly**

**L.R NO NTIMA/IGOKI/7767**

**1. Isabella Gacheri S. M'Ithia....whole**

**3. L.R NO NTIMA/IGOKI/7768**

**1. Mary Nkatha**

**2. Rose Makandi Kithia**

**3. Evangeline Ntinyari S. M'Ithia**

**4. Florence kendi**

**5. Nancy Kagwiria Mwirigi.....all to own jointly**

**4. L.R NO KIIRUA/NAARI/333**

**1. Mary Nkatha.....1 acre**

**2. Evangeline Ntinyari S. M'Ithia....1 acre**

**3. Erick Kithinji Gitonga M'Ithia.....1.5 acres**

**4. Douglas Gikunda M'Ithia.....1.5 acres**

**5. Florence kendi.....1 acre**

**6. Nancy Kagwiria Mwirigi.....1 acre**

**7. Martin Kimathi M'Ithia.....1 acre**

**8. Rose Makandi Kithia.....1 acre**

**9. Kennedy Muriungi M'Ithia.....1 acre**

**10. Isabella Gacheri S. M'Ithia.....balance**

**5. Shares in in Standard Chartered Bank, Barclays Bank of Kenya, Ntimi Nyakiru Society and Miriga Mieru Housing Society to be given to the Petitioner wholly.**

The protestors termed this distribution to be equitable.

### **Submissions**

[6] In their submissions, the protestors stated that all parties have agreed on the distribution of parcels number NTIMA/IGOKI/7766, 7767 & 7768 except **KIIRUA/NAARI/333**. They justified their proposal in respect of this property.

[7] The Petitioner submitted in support of her proposal. She emphasized that the point of departure is inclusion of Kennedy Muriungi as a beneficiary when he is not. She stated that the said Kennedy has never been a dependant of the deceased at all. In any case, he is of age and he has not staked any claim in

the estate except his mother Florence who is getting a share is doing it for him. She was of the view that he is not entitled to any share apart from that of her mother. But she has no problem with Erick and Douglas getting four acres which she said was the share due to their late father who was the son of the deceased.

## **DETERMINATION**

[8] There is no doubt that the Petitioner is the spouse of the deceased. No issue arises out of that. From the onset, I wish to determine:-

### **(a) Whether Kennedy Muriungi M'Ithia is entitled to any share in the estate.**

The Protestors have argued that Kennedy Murungi M'Ithia was a dependant of the deceased, for he was educated and brought up by the deceased on his property. They urged that he still lives on the estate property. I will fall back to the record and evidence before the court. According to the letter by the District Officer, Buuri Division dated 2<sup>nd</sup> August 2011 and which made reference to chief's letter dated 29<sup>th</sup> July 2011, the deceased left the following dependants:

- 1. Isabella Gacheri S. M'Ithia- spouse**
- 2. Rosemary Makandi.....daughter**
- 3. Mary Nkatha.....daughter**
- 4. Evangeline Ntinyari.....daughter**
- 5. Erick Kithinji .....grandson**
- 6. Douglas Gikunda.....grandson**
- 7. Florence kendi.....daughter**
- 8. Nancy Kagwiria .....daughter**
- 9. Martin Kimathi .....adopted son**

[9] It has been said in these proceedings by the Petitioner that the said Kennedy Muriungi M'Ithia is an adult and that he has not made any claim of dependency. She stated that the said Kennedy has never been a dependant of the deceased and that her mother- the 2<sup>nd</sup> protestor- was merely making the claim for him. The 2<sup>nd</sup> Protestor did not tell this court how old Kennedy is. However, I do not doubt that Kennedy is an adult and I will treat him as such. He is, therefore, capable of staking his own claims. His mother is living and so he cannot be claiming under the principle of representation in section 41 of the Law of Succession Act. His claim as it has been presented is that of a dependant of the deceased. Under section 29(b) of the Law of Succession Act, dependant means:-

### **(b) such of the deceased's...grandchildren...whom the deceased had taken into his family as his own... and.... as were being maintained by the deceased immediately prior to his death.**

Proof of dependency in case of a grandchild is necessary and must be proved by the person alleging- in this case the 2<sup>nd</sup> Protestor. Kennedy is a grandchild of the deceased and must prove dependency under section 29(b) of the Law of Succession Act. Notably, Kennedy who is an adult did not file any statement under oath to state his dependency. Even from the record, he was not listed as one of the dependants by the District Officer or the chief. Other than the statements by the protestors that he was educated and brought up by the deceased, there is absolutely no other evidence to prove that Kennedy was a dependant of the deceased in the sense of section 29(b) of the Law of Succession Act. Accordingly, I find

that Kennedy Muriungi is not a dependant of the deceased for purposes of this estate. I reject that claim.

## **Distribution**

### **Shares**

[10] I now move to the other issues on distribution. I will determine the issue below for obvious reasons; it is fairly straight-forward:-

**(a) Whether the deceased had shares in Standard Chartered Bank, Barclays Bank of Kenya, NtимиNyakiru Society and MirigaMieru Housing Society and who should be entitled to them.**

From the submissions, the protestors abandoned their earlier proposal that the shares be shared; 75% to all the children of the deceased; and 25% to the Petitioner. They now agree that the shares to be given to the Petitioner wholly. The only doubt is whether the deceased had any shares in **NtимиNyakiru Society and MirigaMieru Housing Society**. I find that there is nothing to suggest that he did not own such shares. Accordingly, I order that all shares owned by the deceased in Standard Chartered Bank, Barclays Bank of Kenya, NtимиNyakiru Society and MirigaMieru Housing Society shall go to the Petitioner absolutely.

### **Immovable properties**

[11] The more thorny issue is distribution of immovable properties of the deceased. Parties seem to suggest that they have agreed on the distribution of **L.R NO NTIMA/IGOKI/ 7766, 7767 & 7768**. But looking at the proposal by the Petitioner and that of the Protestors, there is a marked difference as the Petitioner proposes distribution theretoto be as follows:

**1. L.R NO NTIMA/IGOKI/7766- approximately 0.028 Ha**

**K. Florence Kendi and**

**I. Mary Nkatha.....to own jointly**

**2. L.R NO NTIMA/IGOKI/7767- approximately 0.28 Ha**

**a. Evangeline Ntinyari S. M'Ithia**

**b. Rose MakandiKithia**

**c. Erick Kithinji Gitonga and**

**d. Douglas GikundiMithia...to own jointly in equal shares**

**L.R NO NTIMA/IGOKI/7768- approximately 0.51 Ha**

**a. Isabella GacheriS. M'Ithia...whole**

Whereas the protestors propose distribution thereof to be as follows:-

**1. L.R NO NTIMA/IGOKI/7766- approximately 0.028 Ha**

**a. Erick Kithinji**

**b. Douglas Gikunda.....to share equally**

**2. L.R NO NTIMA/IGOKI/7767- approximately 0.28 Ha**

**a. Isabella Gacheri S. M’Ithia....whole**

**3. L.R NO NTIMA/IGOKI/7768- approximately 0.51 Ha**

**a. Mary Nkatha**

**b. Rose MakandiKithia**

**c. Evangeline Ntinyari S. M’Ithia**

**d. Florence Kendi**

**e. Nancy KagwiriaMwirigi**

[12] The parties describe the three parcels as ‘plots’; indeed their sizes is small compared to KIIRUA/NAARI/333 which they describe as the ‘main land’. I note, that parties have agreed that the spouse should get one of the plots whole but which one? The Petitioner proposed that she gets **L.R NO NTIMA/IGOKI/7768** measuring approximately 0.51 Ha whereas the protestors propose that she gets **L.R NO NTIMA/IGOKI/7767** measuring approximately 0.28 Ha. Parcel number 7768 is certainly much bigger than number 7767. It is only equitable that the Petitioner gets **L.R NO NTIMA/IGOKI/7767** measuring approximately 0.28 Ha and the bigger plot being **L.R NO NTIMA/IGOKI/7768** measuring approximately 0.51 Ha be shared among all the daughters of the deceased as follows:-

**1. L.R NO NTIMA/IGOKI/7768- approximately 0.51 Ha**

**a. Mary Nkatha**

**b. Rose Makandi Kithia**

**c. Evangeline Ntinyari S. M’Ithia**

**d. Florence Kendi**

**e. Nancy KagwiriaMwirigi**

The two grandsons will share:-

**1. L.R NO NTIMA/IGOKI/7766- approximately 0.028 Ha**

**a. Erick Kithinji**

**b. Douglas Gikunda..... equally**

The two sons of the late son of the deceased are taking their late father’s share under the principle of representation in section 41 of the Law of Succession Act. And under the principle of equality in the Law of Succession Act, sons and daughters are equal. Accordingly, the share of the deceased son should not be larger than that of the daughters of the deceased simply because he was a male child. But the plot the two have taken is smaller and I will consider that fact in the sharing of **KIIRUA/NAARI/333** in order to attain equality and equity.

[13] I now turn to the most contentious property namely **L.RKIIRUA/NAARI/333**. I stated earlier that I will consider Eric and Douglas in the sharing of this land in order to attain the principle of equality enshrined in section 38 of the Law of Succession Act. Here I am guided by the decision of the Court of Appeal in the case of **STEPHEN GITONGA M’MURITHI vs. FAITH NGIRAMURITHI [2015] eKLR** that:-

**“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”**

I have found and held that Kennedy Muriungi is not a dependant of the deceased for purposes of this succession. He will not, therefore share in this property as had been proposed by the Protestors. I also stated that Erick and Douglas were sons of late Titus Gitonga M’Ithia, the son of the deceased who will betaking the share due to their late father under the principle of representation in section 41 of the Law of Succession Act; which in any case should be equal to that of the daughters. I note that the Petitioner proposes that each one of them be given 2 acres in **L.RKIIRUA/NAARI/333**. The protestors on the other hand propose that each should get 1.5 acres from the said land. With tremendous respect and in the spirit of equality, to allow the two to get 4 acres in **L.RKIIRUA/NAARI/333** will be unfair; the measure here is that they are entitled to share the one share of their late father. Except, however, they got a smaller plot and equity will justify that I allot each one of them 1.5 acres in this land. Isabella Gacheri S. M’Ithia got a bigger plot and so she will receive one acre from this land. The balance thereof shall be shared equally by:-

- 1. Mary Nkatha**
- 2. Evangeline Ntinyari S. M’Ithia**
- 3. Florence kendi**
- 4. Nancy Kagwiria Mwirigi**
- 5. Martin Kimathi M’Ithia and**
- 6. Rose Makandi Kithia**

#### **Final Orders**

[14] The above analysis leads to this. The grant herein is confirmed. In line with the principle of equality enshrined in the Law of Succession Act, this estate shall be distributed as follows:-

- 1. L.R NO NTIMA/IGOKI/7766- approximately 0.028 Ha**
  - a. Erick Kithinji**
  - b. Douglas Gikunda..... equally**
- 2. L.R NO NTIMA/IGOKI/7767 approximately 0.28 Ha**
  - a) Isabella Gacheri S. M’Ithia**
- 3. L.R NO NTIMA/IGOKI/7768- approximately 0.51 Ha shall be shared equally among:-**
  - A. Mary Nkatha**
  - B. Rose Makandi Kithia**
  - C. Evangeline Ntinyari S. M’Ithia**
  - D. Florence Kendi**
  - E. Nancy Kagwiria Mwirigi**

**4. L.RKIIRUA/NAARI/333**

- a) **Erick Kithinji Gitonga...1.5 acres**
- b) **Douglas Gikundi Mithia...1.5 acres**
- c) **Isabella Gacheri S. M'Ithia...1 acre**
- d) **Balance thereof shall be shared equally among:-**

- 1. Mary Nkatha**
- 2. Evangeline Ntinyari S. M'Ithia**
- 3. Florence Kendi**
- 4. Nancy Kagwiria Mwirigi**
- 5. Martin Kimathi M'Ithia and**
- 6. Rose Makandi Kithia**

This being a matter involving close family matter, I order that each party shall bear own costs of the cause. It is so ordered.

**Dated, signed and delivered in open court at Meru this 20<sup>th</sup> day of March 2017**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Kitheka advocate for protestors

Mrs. Ntaragwi advocate for Petitioner

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**F. GIKONYO**

**JUDGE**