



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**SUCCESSION CAUSE NO. 503 OF 2006**

*(In the matter of the estate of Gachingiri Kiragu alias Gachingiri s/o Kiragu (Deceased))*

**BETHUEL KIMITI GATHAGE.....PETITIONER**

**VERSUS**

**WANGECHI GACHINGIRI**

**RUO GACHINGIRI**

**KANGA GACHINGIRI.....PROTESTORS**

**JUDGMENT**

The deceased Gachingiri Kiragu died on 18<sup>th</sup> March, 1976 aged 50; he was domiciled in Kenya and his residence was at a place called Loc. 14 Karindi, apparently in Nyeri County.

One Nyuthe Kiragu petitioned this court for letters of administration of the deceased's estate on 7<sup>th</sup> March, 2007. He described himself as the deceased's brother and he named the following persons as surviving the deceased:-

1. Wangechi Gachingiri (widow)
2. Ruo Gachingiri (son)
3. Kanga Gachingiri (son)
4. Wahome Gachingiri(son)

The only asset comprising the deceased's estate is indicated in the petition to be a parcel of land known as **Title No. Gikondi/Karindi/286** that measures approximately **3.24 ha**; he did not have liabilities.

The record shows that the grant of letters of administration was initially made to Nyuthe Kiragu on 3<sup>rd</sup> July, 2007 and on 27<sup>th</sup> February, 2008 he filed a summons for confirmation of the grant. In the affidavit in support of the summons for confirmation of grant, the administrator proposed to have estate divided into two equal shares with one share being transferred to him and the other share being distributed amongst the deceased's widow and sons.

Stephen Mwangi Gichingiri who described himself as the son of the deceased though he was not included in the list of the deceased's survivors filed an affidavit protesting against the confirmation of grant in terms proposed by the administrator. His major contention was that estate should be distributed to his widow and children and the administrator has no part in it because he was only a step brother to the deceased.

The deceased's widow together with two of her sons also filed an affidavit of protest against the confirmation of grant. She acknowledged that Stephen Mwangi Gichingiri was her son and that she agreed with him that the deceased's estate should be shared equally amongst the deceased's immediate family members who in this case are herself and her sons.

The widow contented that the deceased's land was registered in his name as the absolute registered proprietor and he did not hold it as a trustee for anybody including the administrator. In any event, so the deceased's widow deposed, the administrator never laid any claim on the deceased's parcel of land in his lifetime. According to her, the administrator had his own land in Murang'a County where he was residing with his family.

The administrator died while the cause was pending and was substituted in that capacity by his son who is named as the petitioner herein.

Directions were taken that the protest and the confirmation shall be disposed of upon taking oral evidence. At the hearing, the protestors adopted their affidavits of protest as their evidence. Ruo Gachingiri added in his testimony against the confirmation of grant that they were seven children but that two of them died; however, it was not clear from his testimony whether they predeceased the deceased. One of those who died was their brother who is survived by a widow Hannah Wanjiru whom they have all agreed that she should be given two acres out of the estate. He also testified they have a sister called Esther Wamboi Gachingiri but who, in their proposal ought not to be given anything.

The administrator on the other hand reiterated his depositions in the affidavit in support of the summons for confirmation of grant and insisted that the land should be divided into two equal shares and that he should get one share which he claimed was held in trust for his deceased father. He testified that his late father and the deceased were step brothers; they shared a father but had different mothers. According to him there was an agreement between his father and the deceased that the latter was to give his father four acres of the land comprising the estate and his father would give the deceased four acres of land in Muranga during the land consolidation in 1958; however, the deceased never met his part of the agreement.

The deceased died in 1976 before the **Law of Succession Act, Cap. 160** Laws of Kenya came into force; according to **section 2 (2) of the Act**, the estates of persons dying before the commencement of the Act are subject to the written laws and customs applying at the date of death, however, the administration of their estates shall commence or proceed so far as possible in accordance with the Law of Succession Act.

Despite the deceased having died before the commencement of the Law of Succession Act, the petitioner embraced the Act in the administration and distribution of the estate; this is demonstrated by the very fact that the petition for the administration and the application for the distribution of the estate was made in accordance with the provisions of the Act. There is no question and none has arisen that the estate of the deceased is subject to any other written law or customs that may have applied at the time of his demise. This being the case, the administration of the deceased's estate must be in accordance with the Law of Succession Act; in particular, the intestacy provisions of that Act will apply since the deceased died intestate.

Both the administrator and the protestors were in agreement, and there was no evidence to the contrary, that the deceased was survived by his widow and children. The law applicable to the administration and distribution of his estate would therefore be **section 35** of the **Law of Succession Act** which provides as follows:-

**35. (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to -**

**(a) the personal and household effects of the deceased absolutely; and**

**(b) a life interest in the whole residue of the net intestate estate:**

***Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.***

**Section 40** to which reference has been made is of little relevance here since it deals with distribution of an estate where the intestate was polygamous.

As noted earlier the only one asset comprising the deceased's estate and subject to distribution in this cause is land **Title No. Gikondi/Karindi/286**; there was no claim for personal or household effects of the deceased and even if there was, the law is clear that the deceased's widow would have been entitled to them absolutely.

It is equally clear in **section 35. (1)(b)** that the deceased's widow is entitled to a life interest in the land **Title No. Gikondi/Karindi/286** which is the deceased's net intestate estate as long as she remains unmarried. There was no allegation that that the widow in this case had remarried and therefore the proviso to section 35. (1)(b) does not apply.

Despite what the law entitles her, the deceased's widow was of the opinion that the deceased's net intestate estate should be distributed amongst his family members in equal shares; the family members referred to here are herself and the deceased's children; Hannah Wanjiru Kiragu said to be the widow to one of the deceased's children was also included amongst the family members proposed to benefit from the estate.

Ordinarily, where the net intestate estate devolves upon a widow as contemplated under **section 35. (1)(b)** of the **Act**, she retains the power of appointment according to which she may give any part of the estate to the surviving child or children during the subsistence of her life interest in the estate. This is provided for under **section 35 (2)** of the **Act** which states:-

***(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.***

Considering that the widow can distribute the estate amongst her children in exercise of the power of appointment vested in her under this provision, I see nothing wrong if she cedes this power and opts for the distribution of the estate to herself and the children at the confirmation proceedings; I say so because, as long as the widow and the children are in agreement, the distribution of the estate either at the confirmation proceedings or in exercise of the power of appointment will ultimately achieve the same purpose.

Things are clear thus far; however, the administrator who, from the evidence available, is the deceased's nephew is claiming what he has described as his father's share in the deceased's estate. If I followed his argument correctly, his case is that though the deceased was registered as the owner of **Title No. Gikondi/Karindi/286** he was not the sole and absolute owner of that land; he held a half share in trust for his late father whose interest the administrator is now pursuing.

The administrator's claim is based on what I suppose is customary law trust which is a concept of ownership of land that was initially recognised more in judicial precedents or judge-made law than in statutory law. Referring to this concept and the proposition that the registered owner must be indicated in the register as 'trustee' before one can be said to holding the land in trust, Justice Madan said in **Gatimu versus Muya Gathangi (1976)KLR 265** that:

***As regards section 126, there was no need to register the defendant 'as trustee'. He was registered owner as the oldest son of the family in accordance with Kikuyu which has the inherent of trust in it. Ordinarily, in pursuance of Kikuyu custom he would have transferred a half share in 'marango' (Land) to the plaintiff. In any event this section does not make registration 'as trustee' obligation. It states that a person may be described by that capacity.***

The learned judge was quoting his own statement in *Mwangi Muguthu versus Maina Muguthu (unreported)* where the same issue arose. **Section 126** which the learned judge referred to in this paragraph is a provision in **Registered Land Act (Cap 300)** (now repealed). Referring to **section 143 (1)** of the same **Act**, the learned judge held that the registration of the title in the name of the defendant was done in pursuance of custom and by consent of everybody involved. The court held that the law did not exclude recognition of a trust as long as it can be established; the learned judge held:

*Parliament could not have intended to destroy this custom of one of the largest sections of people of Kenya. It would have required express legislation to enable the courts to so hold.*

The court held that the plaintiff held the parcel of land in issue in trust for himself and the defendant as tenants in common in equal shares and ordered the defendant's name to be entered in the register.

This concept of land tenure is now statutorily recognised; it is so recognised under **section 5 (1) (d)** of the **Land Act, No. 6 of 2012** and **section 28 (b)** of the **Land Registration Act, No. 3 of 2012**.

Now, if this is the course the administrator had taken, then he must have mistaken as to the time and the appropriate forum to dispose the question whether he was he or his deceased father had a beneficial interest in the land known as **Title No. Gikondi/Karindi/286**. If there was any dispute as to ownership of this parcel of land, it was incumbent upon the administrator to have this particular issue resolved before he proceeded to petition for letters of administration of the deceased estate and apply for its distribution; it was not legally right for him to proceed on the presumption of an existing trust when there is no evidence of such trust. Certainly this court cannot proceed and distribute the estate on that same presumption when the evidence available shows that the deceased was the absolute registered proprietor of **Title No. Gikondi/Karindi/286**.

The administrator himself admitted that his father had and they still have land in Murang'a and there is no time that they have ever lived on the deceased's estate. He also admitted that even his own deceased father did not lay any claim on the deceased's land between the time he was registered as the owner in 1959 and the time of his demise in 1976. It is only after the deceased's demise that he sought to assert his purported ownership rights over **Title No. Gikondi/Karindi/286** when he lodged this petition in 2007. My answer to him is that if he has any ownership claim over this parcel of land, regardless of whether it is based on trust or on any other interest in land, then such claim cannot be determined in this succession cause. As a probate and administration court, this Court cannot venture into the question of whether a trust exists and therefore, whether the administrator must be assumed to be a joint owner of the deceased's estate. For purposes of administration of the deceased's estate this court can only be guided by the material before it which in this case show that the deceased was the absolute owner of **Title No. Gikondi/Karindi/286** and only his spouse and children are beneficially entitled to this estate under the provisions of Law of Succession Act; the administrator and his kin have no portion in it.

Having so concluded, I hold that the deceased's estate shall be divided and shared equally amongst his spouse and children; children here include Esther Wambui Gachingiri who appears to have been omitted from the list of persons beneficially entitled to the deceased's estate. No reason was given for what in effect would amount to disinheriting her; I also note that she has not renounced her inheritance and therefore there is no reason why she should not get a share of the estate of the deceased just like the rest of his surviving children.

The deceased's spouse and children also agreed that Hannah Wanjiru Kiragu should get a share of the estate; she was said to be the deceased's daughter in law; she was married to the deceased's son who is now deceased himself. It is not clear whether he died before or after the demise of the deceased. Ordinarily, she should have sought the authority of this court to represent the estate of her late husband and pursue his interests in the deceased's estate but I will take it that since the deceased's spouse and her children have agreed that she should get a share of the estate she shall get such a share as the deceased's other dependant, in her own right. In the final analysis I hereby distribute land known as **Title No. Gikondi/Karindi/286** which measures approximately 3.24 ha or 8 acres as follows:-

1. Wangechi Gachingiri.....1.14 acres
2. Ruo Gachingiri.....1.14 acres
3. Kanga Gachingiri.....1.14 acres
4. Wahome Gachingiri.....1.14 acres
5. Hannah Wanjiru Kiragu.....1.14 acres
6. Esther Wambui Gachingiri.....1.14 acres
7. Stephen Mwangi Gichingiri.....1.14 acres

Except for Wangechi whose share is subject to life interest, the respective shares for the rest of the beneficiaries shall be transferred and registered in their names as absolute proprietors. The grant of letters of administration issued by this court on 10<sup>th</sup> March, 2009 is hereby confirmed in the forgoing terms.

Parties will bear their own costs. It is so ordered.

**Signed, dated and delivered in open court this 8<sup>th</sup> day of April, 2016**

Ngaah Jairus

**JUDGE**