



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**SUCCESSION CAUSE NO. 120 OF 2009**

***In the matter of the Estate of JACOB NJIRU MBARIRE (Deceased)***

JOHN MIRITI MBARIRE.....APPLICANT/PETITIONER

VERSUS

NICHOLAS IRERI.....RESPONDENT

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

1. The petitioner filed summons for confirmation of grant dated 19/1/2016. The protestor filed an affidavit of protest sworn on 9/2/2016 opposing the petitioner's mode of distribution.

2. The protestor PW1 testified that he relies his affidavit sworn on 9/2/2016 where he stated that the deceased was his father and his mother was one Joyce Kanjiru. The couple were blessed with seven children. One of his sisters Mercy Thaara was married in Britain with three children. Mercy died in a road accident together with her two children. His brother Stephen Mbae is survived by a wife and one child.

3. The deceased left a will and had directed that PW1 should execute it being the eldest son. The will was written in a meeting held in 1994 that was attended by the protestor and his siblings namely the petitioner, John Miriti Mbarire Stephen Mbae, Catherine Gichuku and their late uncle Stanley Njeru.

4. He further stated that the will provides that the property of the deceased should be distributed as follows;

**(a) Kagaari/Kanja/3844 measuring 5 acres**

- John Miriti 2 acres;
- Steven Mbae (deceased) 2 acres; and
- Catherine Gichuku 1 acre.

5. PW1 said he later obtained a green card from the land office showing that the land measured 3.8 acres. He therefore reduced the sizes of the parcels for the beneficiaries as follows;

- John Miriti 1.35 acres,
- Stephen Mbae 1.35 acres;and
- Catherine Gichuku 1 acre.

**(b) Kagaari/Kigaa/4500 measuring ½ acre**

It was to be shared equally between the protestor and his two brothers Stephen Mbae and John Miriti. He

alleged that the petitioner demolished the wooden structures thereon that raised monthly rent of between Kshs.5,000 and 8,000 for the family after a disagreement.

**6. (c) Kagaari/Gikuuri/T.246 measuring ¼ acre**

This was allocated to the late Stephen Mbae and should be inherited by his son Harry Munene according to the protester.

**7. (d) Kagaari/Gitare/T.160** was allocated to the petitioner having been given to him by the clan in 1959. The protester said that this parcel does not form part of the deceased estate. It was registered in the name of the deceased.

8. The protester said that the deceased bought Kagaari/ Kanja/1197 measuring 5-6 acres for him when he was 7 years old. It was registered in his name in 1960.

9. The further protester testified that his siblings are not following the deceased's wishes in that the petitioner wants to take Stephen Mbae's share in Kagaari/Kanja/ 3844, Kagaari/Kanja/4500 and also in Kagaari/Gikuuri/ T.246. He further stated that their late brother Stephen Mbae had separated with his wife Zainabu but his son Munene is entitled to inherit his late father's share.

10. The petitioner (DW1) testified that the deceased was his father and the protestor is his elder brother. That the deceased had seven children including one daughter Catherine Gichuku who is not married but the other two sisters are married.

11. The deceased left a written will dated 13/8/1994 which provides as follows;

**(a) Kagaari/Kanja/3844**

- John Miriti 2 acres;
- Steve Mbae 2 acres;
- Catherine Gichuku 1 acre.

According to the petitioner, the deceased had said that if Catherine got married the one acre given to her would be shared between him and his late brother Steven Mbae. He added that to-date his sister Catherine is still unmarried and should therefore retain her one acre in this parcel.

**12. (b) Kagaari/Kigaa/4500**

The land according to the protester was to be shared equally between the deceased's three sons Jonh Miriti, Nicholas Ireri and Stephen Mbae. Since the plot is L shaped it was decided in a family meeting that the parcel be divided between the petitioner and the protester Nicholas Ireri in equal shares. In the same meeting the petitioner said that it was decided that since their late brother Steven was not married, he (DW1) would hold his parcel in trust for his heirs.

13. He stated further that the meeting did not decide what was to happen in the event that no heir of Steven Mbae came to claim his share. He said that during Steven's burial, one Tahir Jabil claimed that she was his wife and that they had a daughter together. The petitioner further stated that he is also aware that Hanny Munene is his brother's child. He added that there is also another child said to be born by Steven operating boda boda business in Embu and whose name is unknown.

**14. (c) LR Gikuuri/T.246** was given to Steven Mbae by their deceased father and was discussed during a clan meeting. It was decided that their aunt who had been staying there should not be evicted. The protestor was invited to the family meeting but never attended. It later came out in evidence that the said auntie is deceased and is buried on the said plot. The issue of eviction therefore does not arise.

**15. (d) Kagaari/Gitare/T.160** was given to the protester by the deceased through the clan. At the same

time the protestor was given Kagaari/Kanja/1197 which measures six (6) acres where his home is situated.

16. The protestor produced a copy of the deceased's original will. He said that the married daughters of the deceased Rose and Lucy are not claiming any share in the estate.

17. He called one witness DW2 who testified that the deceased was his brother and that he was survived by seven children, three of them daughters two of whom are married. He further stated that the deceased left a written will. After his death, family meetings were held to discuss the distribution of his property and that he chaired the meetings.

18. He said that no changes were made to the will regarding the inheritance of Stephen Mbae who was by then deceased. It was decided that the will be followed as the heir of Stephen was known. Both the petitioner and the protestor admit that the deceased left a written will which was tendered in evidence.

19. According to Section 11 of the Law of Succession act provides that;

*No written will shall be valid unless—*

*(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;*

*(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;*

*(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.*

20. The written will herein only contains two signatures; that of the deceased who was the head of the family and that of one Stanley Njeru Mbarire. In the case of **ELIZABETH CHEPKOECH SALAT VS JOSEPHINE CHESANG CHEPKWONY SALAT [2015] eKLR** the court held that

*"For an oral will to be valid, it has, inter alia, to be made before two or more competent witnesses (section 9(1)(a) of the Act). Similarly, for written will to be valid it has, amongst other things, to be attested to by two or more competent witnesses (section 11(c) of the Act"*

21. In view of the provisions of Section 11 of the Law Succession Act and the Court of Appeal decision above, the will is not valid as it has not been properly attested by two witnesses. I reach a conclusion that the deceased in this case died intestate. The distribution of his estate will therefore be guided by the law of intestate succession.

22. It is evident that the deceased was not survived by a spouse but by his children. The applicable law is Section 38 of the Law of Succession Act provides that;

*"Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."*

23. In the case of **CHRISTINE WANGARI GACHIGI VS ELIZABETH WANJIRA EVANS & 11 OTHERS [2014] eKLR** the court held:-

*"Under section 38 of the Act; all that one needed to establish in this cause was to show that they were either children or grandchildren of the deceased. Matters of failure to participate actively in the litigation proceedings should not have been a disentitling consideration in respect of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> cross appellants, in the absence of their renunciation of respective claims to the estate."*

24. Section 41 of the Law of Succession Act provides that;

*Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.*

25. In the case of **CHRISTINE WANGARI GACHIGI VS ELIZABETH WANJIRA EVANS & 11 OTHERS [2014] eKLR** the court held that;

*"We affirm the learned trial Judges decision that the beneficiaries of the estate of the deceased herein comprised all the deceaseds' children surviving as at the time of distribution and the grandchildren of the deceased children of the deceased who had either predeceased her or died shortly after presentation of the Succession Proceedings to court."*

26. Section 42 of the Law of Succession Act provides that:-

*Where—*

*(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*

*(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.*

27. **SAMUEL MAINA MWANGI & 2 OTHERS VS MUTHONI KAGIRI [2013] eKLR** the court held that;

*Therefore, the trial court was correct in holding that the parcels of land that were given to the appellants would be taken into account in distribution of the deceased's estate.*

28. The property of the deceased in Form P&A 5 comprise of Kagaari/Kanja/3844, Kagaari/Gikuuri/T.246 and Kagaari/Kigaa/4500.

29. Both the petitioner and the protestor agree that the deceased had seven children namely;

(a) Rose Njeri Ayanga - married daughter

(b) Nicholas Ireri – (son) protestor

(c) Mercy Thaara Debenham - deceased daughter

(d) Lucy Gatune Njiru -married daughter

(e) John Miriti Mbarire- )son) petitioner

(f) Catherine Gichuku – unmarried daughter

(g) Stephen Mbae alias Farid Njiru - deceased son

30. According to the provisions of Sections 38 and 41 of the Law of Succession Act, the property should be divided equally amongst the seven children of the deceased with the grandchildren inheriting the share of their deceased parents. The protestor in his testimony stated that the deceased bought Kagaari/Kanja/1197 measuring 5 - 6 acres for him when he was 7 years old and that the same was registered in the protestor's name in 1960.

31. The petitioner also testified that he was a beneficiary of Kagaari/Gitare/T.160 given to him by the deceased through the clan in 1959. It is not in dispute consider that the protestor and petitioner were beneficiaries of property from the deceased during his lifetime.

32. Two of the deceased's children are deceased. Mercy Thaara is survived by Yvonne Mercy Debenham who lives with her father in Britain while Stephen Mbae is survived by Hanny Munene who resides in Germany. Both the petitioner and the protester agree that Yvonne and Munene are grandchildren of the deceased.

33. According to Section 41 of the LSA, the children of Mercy Thaara and Stephen Mbae should inherit the share that would have been inherited by each of their late parents. Since the two grandchildren have not renounced their claim in the estate, they should still inherit their parents shares directly even if they reside abroad. It does not make sense to have the petitioner hold their shares in trust for them for both are said to be adults.

34. This was the position explained in the case of **CHRISTINE WANGARI GACHIGI VS ELIZABETH WANJIRA EVANS & 11 OTHERS [2014] eKLR** where the court held:-

*Under Section 38 of the Act; all that one needed to establish in this cause was to show that they were either children or grandchildren of the deceased. Matters of failure to participate actively in the litigation proceedings should not have been a disentitling consideration in respect of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> cross appellants, in the absence of their renunciation of respective claims to the estate.*

35. Two of the heirs of the estate of Yvonne Mercy Derbenham and Hanny Munene have not been participating in these proceedings directly but through their uncle the protester. Even assuming that the two grandchildren were living in Kenya and kept away from this succession cause, such conduct does not take away their rights of inheritance. Each of them is entitled to the share of the deceased parent as provided for by Section 41 of the Act.

36. The petitioner mentioned three other heirs one of whom he did not even know his by name and who is not known by any other family member. However, there was no tangible evidence that the person mentioned is a child of the late Steven Mbae. Although he is said to be living in Kenya, he made no claim in these proceedings.

37. The petitioner mentioned their names in passing and it appears the aim was solely to oppose the protesters' case for it supported the known children of his late sister and late brother. His witness DW2 contradicted the petitioner when he said that the heir of Steven Mbae is known and should inherit his late father's share. It is my considered opinion that it has not been established that the late Steven Mbae had any other children surviving him apart from Hanny Munene.

38. The heirs in the deceased's estate have therefore been identified as his five (5) children and two grandchildren namely Hanny Munene and Yvonne Mercy Debenham. I find that the two grandchildren are heirs to the estate in equal shares with deceased's children taking the shares of their deceased parents as provided by the law.

39. Under Section 42 of the Act, the property distributed to some of the children during their lifetime shall be taken into consideration in the distribution of the estate. This means that the petitioner and the protester who were given land by the deceased during his lifetime will get less shares than the other

children.

40. It is important to note that the two married daughters of the deceased Rose Njeri Anyanga and Lucy Gatune Njiru are not claiming any share. None of them opposed the mode of distribution by the petitioner which had excluded them as heirs. It was noted that the two ladies attended court severally with their brothers. For this reason, they will therefore remain out of the list of distribution.

41. The petitioner and the protester had indicated that they would hold the shares of the two grandchildren Hanny and Yvonne who are out the country in trust for them. The court has already said that this is not necessary since the children are over 18 years of age.

42. Due to the limited sizes of the properties for distribution, the court will try as much as possible to do equitable (not equal) distribution as well as avoid tying the heirs together in small and uneconomical portions especially considering that some heirs are living abroad. It is an accepted principle in law that where equality is not possible the court must ensure equitability.

43. There are 3 assets available for distribution and will be shared as follows:-

(a) **Kagaari/Kanja/3844** measuring 1.68 ha.

Catherine Gichuku - 2 acres

John Miriti Mbarire - 2 acres

(b) **Kagaari/Kigaa/4500** measuring 0.5 acres

Catherine Gichuku - wholly

(c) **Kagaari/Gikuuri/T.246** measuring 0.10 ha.

Hanny Munene

Yvonne Mercy Debenham - In equal shares

44. It was not in dispute that Plot No. T.160 belongs to the petitioner John Miriti Mbarire having been given to him by the deceased during his lifetime.

45. Each party to meet their own costs.

46. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF MAY, 2016.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**The petitioner**