



**REPUBLIC OF KENYA**

**HIGH COURT**

**MILIMANI LAW COURTS – FAMILY DIVISION**

**IN THE MATTER OF THE ESTATE OF SAMUEL MUCHENE KIRUMBA (DECEASED)**

**SUCCESSION CAUSE NO. 2700 OF 2009**

**BETWEEN**

**ELIZABETH WANJIRU MBURU..... APPLICANT**

**AND**

**SAMUEL NGUMI KIRUMBA..... 1<sup>ST</sup> RESPONDENT**

**HELLEN MUGURE..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

The Applicants, Samuel Ngumi Kirumba and Hellen Mugure Kirumba filed the present Summons Application dated 2<sup>nd</sup> October, 2014 seeking confirmation of the Grant of Letters of Administration intestate in the present matter.

**THE APPLICANTS' CASE**

In their joint Affidavit sworn on 2<sup>nd</sup> October 2014, the Applicants outlined the beneficiaries to the deceased's Estate as follow:

- (a) Elizabeth Wanjiru Mburu- sister- adult
- (b) Samuel Ngumi Kirumba – brother – adult
- (c) Jean Njoki Njenga – sister – adult
- (d) Hellen Mugure Kirumba – sister-in-law – adult
- (e) Grace Waithera Kirumba – sister – died on 15<sup>th</sup> February, 2000
- (f) Francis Kamuyu Kirumba – brother – died on 8<sup>th</sup> October, 2001

(g) Wilfred Thuo Kirumba – brother – died on 10<sup>th</sup> August, 2011.

The Applicants averred that the deceased was not survived by any other dependant and as such, no Application for the provision for dependents has been filed or is pending, and that no Estate duty is payable in respect of the Estate.

The Applicants informed the Court that the deceased had two assets registered under his name, namely:

(a) Quarter (1/4) share in parcel of land known as Title No. Dagoretti/Uthiru/575

(b) Quarter (1/4) share in parcel of land known as Title No. Dagoretti/Uthiru/ 576

They contended further that in 1973, the second parcel of land was compulsorily acquired by the Government for the construction of the Kangemi-Kabete (A109) interchange and as such, the only asset available for distribution to the survivors is the parcel Title No. Dagoretti/Uthiru/575. In that regard, the Applicants propose to have the said property distributed to the beneficiaries in equal shares.

### THE RESPONDENTS' CASE

In the Affidavit sworn by Elizabeth Wanjiru Mburu on 5<sup>th</sup> November 2015, the Respondents proposed that the deceased's properties namely ¼ share Dagoretti/Uthiru/575, and ¼ share Dagoretti/Uthiru/576 be distributed to them in equal shares. In that regard, they contended that the property Dagoretti/Uthiru/576 was not acquired by the Government and the same is in the possession of Samuel Ngumi Kirumba, who uses it.

It was their other contention that Michael Kirumba Mumuya, a son to their late sister, Grace Waithera, ought not to benefit from these properties because the said Grace inherited property in Uthiru from their father's Estate while they did not.

The Respondents argued that their siblings inherited their father's property while they were deliberately excluded and that Elizabeth Wanjiru Mburu is the first born in the family and took care of the deceased for many years when he was suffering from a mental condition that used to recur.

The Respondents through their Written Submissions dated 31<sup>st</sup> March 2016, rebutted the contentions by the Applicants that the property Title No. Dagoretti/Uthiru/576 was compulsorily acquired by the Government in 1973. They in that regard argued that the said property was not acquired by the Government as alleged, as per the Certificate of Search dated 8<sup>th</sup> December 2014. In that regard, it was their contention that the Applicants are misleading the Court and that in any event, it has been 33 years since the land was allegedly acquired and yet there is no restriction on the title.

Furthermore, they averred that the 1<sup>st</sup> Applicant is using the land, and that they have not adduced any evidence before the Court in support of their contentions that the land was acquired and that compensation was paid to that effect.

On the mode of distribution, they urged the Court to distribute the deceased's Estate to them owing to the fact that the property had been distributed to their four brothers initially and that they were deliberately excluded. As such, they urged the Court to direct that the property be distributed to them.

It was the Respondents' further argument that whereas **Section 39 (1) (c)** of the **Law of Succession Act** sets out the order of priority where an intestate has left no surviving spouse or children, this Court has unfettered discretion to consider all circumstances and as such, in applying the said **Section** to the circumstances of the present case, great injustice would be suffered by them.

For the foregoing reasons, they urged the Court to order the distribution of the Estate to Elizabeth Wanjiru Mburu and Jean Njoki Njenga, to the exclusion of all others who have shares in the same Estate.

## **DETERMINATION**

The key issue for determination is whether the Court ought to confirm the Grant as urged by the Applicants. It is undisputed that only four people are alive and hence the deceased's beneficiaries. At the core of the dispute however, is the status of the property, parcel of land, known as Title No. Dagoretti/Uthiru/576 and whether it is available for distribution and the subsequent distribution of the deceased's entire Estate.

As to the status of the said parcel, the Court notes that from the letter dated 10<sup>th</sup> June 2014, written by one Eng. M. O. Kidenda, the said parcel, was subdivided from the original parcel, Dagoretti/Uthiru/253, and the same was vide Gazette Notice Nos. 976 and 977 of 30<sup>th</sup> March, 1973, acquired for the construction of a traffic interchange at Uthiru. It will be noted that the said information was obtained from the Kenya National Highways Authority.

On the other hand, the Court notes that from the Certificate of Search dated 8<sup>th</sup> December, 2014, annexed to Elizabeth Wanjiru's Affidavit dated 5<sup>th</sup> November, 2015, the said parcel was not acquired and that the proprietors of the said land are Wilfred Thuo Kirumba, Samuel Muchene Kirumba, Samuel Ngumi Kirumba and Francis Kamunyu Kirumba.

The Court further notes that the Respondents had filed **Land Dispute Claim No. 6 of 2006** in which they had sought a share from the said parcel. In a decision rendered on 27<sup>th</sup> May 2009, the Tribunal rendered itself as follows:

***“Having listened to both parties and having perused through all the documents available, the elders keep the Kiambu LDT aside since it has no jurisdiction over registered property under Cap 300 and hence the suit parcel remains as registered under Wilfred Thuo Kirumba (ID 4835740), Samuel Muchene Kirumba (ID 0374567), Samuel Ngumi Kirumba (ID 3111048) and Francis Kamuyu Kirumba (ID 0904008). No costs awarded.”***

It will be noted that the Tribunal dismissed the same on the basis that it lacked jurisdiction as the said property was registered under Cap 300. In that regard therefore, the matter was not determined on the merits.

What then is the status of the said land? The Court notes further that the Gazette Notice No. 976 was to the effect that the Government intended to acquire the said property for the construction of the Kangemi-Kabete (Dual Carriage-way), while the Gazette Notice No. 977 was to the effect that an inquiry was to be held at 9:00 am, on Thursday, 26<sup>th</sup> April, 1993, at Uthiru market, for the hearing of claims to compensation by persons interested in the said property.

No further evidence has been placed before the Court in regard to the transfer or title to the said property. However, from the Certificate of Search dated 8<sup>th</sup> December 2014, it is evident that the property is not registered in the Government's name and in any event, the Title Deed, issued on 15<sup>th</sup> February 2001, by the Kiambu Land Registry, presented before this Court indicates that the deceased still owns a share in the property. On that basis, the Court is inclined to hold that the property still forms part of the deceased's Estate.

On that basis, the next question that begs for answers is; what is the mode of distribution of the deceased's Estate in the circumstances? On that note, it will be noted that the deceased was unmarried and did not have any children. It therefore follows that the mode of distribution will be in line with the provisions of **Section 39** of the **Law of Succession Act** which provides that:

***(1) Where an intestate has left no surviving spouse of children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-***

***(a) Father; or if dead***

***(b) Mother; or if dead***

***(c) Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none***

***(d) Half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none***

***(e) The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.***

***(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of sub-section (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.***

Based on the foregoing, it follows therefore that the deceased Estate is to be distributed to the deceased's surviving family owing to the fact that his parents died before him.

**DISPOSITION**

As a result of my findings and reasoning above, the Court orders that:

**1) ¼ Dagoretti/Uthiru/575 shall be distributed equally to:**

**a) Elizabeth Wanjiru Mburu;**

**b) Jean Njoki Njenga;**

**c) Samuel Ngumi Kirumba;**

**2) ¼ Dagoretti/Uthiru/576 shall be distributed equally to:**

**d) Elizabeth Wanjiru Mburu;**

**e) Jean Njoki Njenga;**

**f) Samuel Ngumi Kirumba;**

**3) Let each Party bear their own costs.**

**READ AND SIGNED IN OPEN COURT AT NAIROBI THIS 6<sup>TH</sup> DAY OF OCTOBER, 2016.**

**M. W. MUIGAI**

**JUDGE**

***In the presence of:***

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