



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**MISC. SUCCESSION CAUSE NO. 8 OF 2016**

**(FORMERLY CHUKA SPM SUCCESSION CAUSE NO. 364 OF 2011)**

**IN THE MATTER OF THE ESTATE OF GICHIRA NDUGO- DECEASED**

**EVANGELINE KANYUA BASILIO.....APPLICANT**

**- VERSUS-**

**DICKSON MWITI SALESIO.....RESPONDENT**

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

1. The late Gichiwa Ndugo (“*the deceased*”) died on 24<sup>th</sup> November, 2006. He was survived by Anisia Cianjoka, Asunta Ciambaka, Victor Mbuba, Salesio Njenga (deceased), Anyes Kaari, Jenesia Kanini, Boniface Nyamu, Evangeline Kanyua and Josephat Mugambi. He also left the property known as Magumoni/Mwonge/787 to his estate. However, in his letter of introduction dated 15<sup>th</sup> October, 2011, the Chief of Kabubuni Location introduced three (3) sons and a grandson of the deceased as the only beneficiaries of the deceased. Pursuant thereto on 23<sup>rd</sup> November, 2011 Dickson Mwiti Salesio lodged in the Chuka PM’s Court a Petition for Letters of Administration Intestate for the estate of the deceased.

2. The grant was issued on 16<sup>th</sup> January, 2012 and subsequently confirmed on 17<sup>th</sup> October, 2012 as follows:-

**LR Magumoni/Mwonge/787**

- a) Victor Mbuba - 1.253 acres
- b) Bonface Nyamu - 1.053 acres
- c) Dickson Mwiti - 1.153 acres

**LR Karingani/Mugirirwa/549**

- a) Josphat Mugambi - 1.43 acres

**LR Karingani/Ndagani/1130**

- b) Dickson Mwiti - 1.2 Ha

3. Aggrieved by the said distribution, Evangeline Kanyua Basilio (“*the Applicant*”) took out Summons

for Revocation of that grant on 14<sup>th</sup> April, 2016. She contended that the Succession Cause that she was lodged secretly and the grant obtained fraudulently; that there was concealment of something material in that she and all her sisters were never disclosed as beneficiaries; she therefore sought for the grant to be revoked, the titles issued pursuant thereto be cancelled the estate be distributed afresh. In her testimony, the Applicant (PW1) told the court that she was living within Karingani/Mugirirwa/549 (“plot No. 549”) and would like the portion she was occupying be distributed to her to hold for her own behalf and on behalf of her sisters.

4. The Applicant’s sisters, Asunta Ciambaka (PW<sub>2</sub>), Jenesia Karimi (PW<sub>3</sub>) and Jane Kambura (PW<sub>4</sub>) supported the Applicant’s testimony. They told the court that the deceased had shown daughters their portion in plot No. 549 which they claimed. They told the court that two of their sisters, Anisia Cianjoka and Anyes Kaari did not wish to claim anything from the estate. Japheth Mbiria M’Baini (PW<sub>5</sub>), the chairman of the Kui Gakunya clan to which the deceased and his children belonged appeared and testified. He told the court that the clan had sat and determined that the daughters do get 0.48 acres whilst each of the sons do get 1 acre each.

5. Victor Mbuba (RW<sub>1</sub>), a son of the deceased told the court that when the sons of the deceased met, they distributed the estate without considering their sisters. That he was not opposed to the sisters getting a portion of the estate and that although Karingani/Ndagani/1130 (“plot No. 1130”) had been distributed to Dickson Mwiti, their nephew, it was meant to be subsequently divided equally amongst the sons of the deceased. The Petitioner Dickson Mwiti (RW<sub>2</sub>) told the court that he was a grandson of the deceased. He admitted that the daughters of the deceased were not involved in the Succession Cause; that the deceased had set aside a portion of approximately 0.60 acres for his daughters which he was not opposed if the same was distributed to them.

6. At the conclusion of the hearing all those involved executed a consent varying the certificate of confirmation by distributing 0.60 acres to the daughters of the deceased. The court sent the parties back to the clan to decide on the issue of Plot No.1130 as there was conflicting evidence on how it was to be distributed. However, instead of dealing with the issue of plot No.1130 only, the clan decided that the daughters be granted 0.48 acres in plot No. 549, the rest of the brothers do share plot No. 787 while plot 1130 measuring 2.47 acres do remain with Dickson on the ground that he had catered for the costs of this Succession Cause. The daughters disclaimed the said agreement stating that they had been forced to sign the same. The matter was therefore left to the court to determine.

7. After considering the testimonies of the witnesses, the issue for determination are two; whether the grant should be revoked; and if so how the estate should be distributed.

8. On the first issue, there was no dispute that none of the daughters of the deceased was involved in bringing this succession cause; their consent was neither sought nor were they catered for on distribution. The parties were generally in agreement that the deceased had set aside a portion of land for his daughters. When the Petitioner lodged his Petition, he indicated in form No. P & A5 that there were only five (5) beneficiaries to the estate. The existence of the daughters was never disclosed. In this regard, it is clear that there was concealment of material facts and the Petitioner had made a false statement. In this regard, the grant cannot stand and the same is hereby revoked and all the consequent orders set aside.

9. As regards distribution, this court notes what section 38 of the Law of Succession Act Cap 160 of the Laws of Kenya stipulates. The said section provides:-

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

In the case of Stephen Gitonga M’Murithi .v. Faith Ngira Murithi Nyeri CA No.3 of 2015 (UR) the Court of Appeal held:-

***“The Appellant’s complaint against the above mode of distribution is that it failed to take into***

*account the clear principles of law enshrined in section 38 and 40 of the Law of Succession Act. Cap 160 Laws of Kenya. 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, Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each household of a polygamous deceased.*

*Applying the above principles to both the learned trial Judges' reasoning and distribution, it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38n of the Law of Succession Act by discriminating against the married daughters of the deceased. See Rono .v. Rono & Anor [2008] 1 KLR (G&F)803."*

10. It is clear from the foregoing that unless the parties agree on how an intestate of the deceased is to be distributed, the same is to be distributed equally amongst all the children of the deceased without discrimination whatsoever on the basis of gender, married or unmarried. What is to be done is that total acreage being divided equally amongst all the beneficiaries. In the present case, the parties had signed a consent in court that a portion of 0.60 acres be distributed to the daughters of the deceased. However, when the court gave them a chance under Article 159 of the Constitution to go home and with the help of the clan elders they settle how adjustments had to be effected in the rest of the estate; the daughters alleged that they were forced to accept 0.48 acres. The clan purported to vary the consent already recorded of 0.60 acres in favour of the daughters. Even Josphat Mugambi and Boniface Nyamu turned around and stated that if the daughters are granted 0.48 acres they will not claim anything from the estate. The daughters present in court on 6<sup>th</sup> October, 2016 insisted that they should be given 0.60 acres. They opposed the Ndagani property plot No. 1130 being given to Dickson Mwitii alone.

11. To my mind the total acreage of the estate available for distribution is 7.854 acres. If section 38 was to be applied each beneficiary will each get less than an acre. The court was informed that two daughters of the deceased Anisia Cianjoka and Anyes Kaari were not interested in getting anything from the estate. That leaves seven (7) beneficiaries.

12. Although Josphat Mugambi and Boniface Nyamu stated that they would not press for anything from the Ndagani property, that was tied to their sisters being given only 0.48 acres. Further, Victor Mbuba had challenged the giving of the whole of Ndagani property, plot 1130 to the Petitioner. His contention was that it was to be distributed equally among all the sons at a later stage. There was no evidence to show how much the Petitioner has spent in this Succession Cause so as to wholly distribute plot No.1130 (2.97 acres) to him. Since the daughters were comfortable with getting 0.60 acre only, this court will distribute such a share to them.

13. Accordingly, the estate will be distributed as follows:-

**LR No. Magumoni/Mwonge/787**

- a) Victor Mbuba - 1.2 acres
- b) Boniface Nyamu - 1.2 acres
- c) Dickson Mwitii - 1.06 acres

**LR No. Karingani/Mugirirwa/549**

- a) Josphat Mugambi - 0.83 acres
- b) Evangeline Kanyua - 0.60 acres

To hold on her own behalf and on behalf of:-

- A C

- J K

- J K in equal shares

**LR No.Karingani/Ndagani/1130**

- |                    |   |            |
|--------------------|---|------------|
| a) Dickson Mwiti   | - | 1.16 acres |
| b) Victor Mbuba    | - | 0.50 acres |
| c) Boniface Nyamu  | - | 0.50 acres |
| d) Josphat Mugambi | - | 0.80 acres |

It is so ordered.

**DATED and delivered at Chuka this 3rd day of November, 2016**

**A.MABEYA**

**JUDGE**