

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

SUCC NO. 123 OF 2008

LUCY MAITHA

RAEL NJERI

PAULINE MUKWAITI2ND ADMINISTRATIX

CHARITY UKIMA

JOAN KAARI

VERSUS

GERRARD NJUE M'MUGA.....1ST PETITIONER/RESPONDENT

J U D G M E N T

1. The first administrator and the 2nd administratix, who are brother and sister respectively, were appointed by court as joint administratixes to the deceased estate herein on 4th of October, 2012.
2. That each of the administrator filed his or her mode of distribution of the assets forming the estate of the deceased being land Parcel No. Muthambi/Chamuga/263. The 1st administrator's scheme of distribution was filed on 17th July, 2013 as is set out in his affidavit sworn on 16th July, 2013 whereas the 2nd administratix scheme of distribution was filed on 23rd April, 2013 and is set out in the affidavit sworn on 13th March, 2013.
3. That after filing different scheme of distribution parties sought courts direction on how to proceed with the rival schemes of distribution and court after hearing the counsel's submissions on the issue, it directed that the issue of distribution be determined by way of oral evidence.
4. The 1st administrator gave evidence and called one witness whereas the 2nd administratix similarly gave evidence and called no witness.
5. The 1st administrator's case is that the deceased was his father who had nine (9) children being eight (8) daughters and one (1) son, out of which five (5) daughters are dead leaving 4 daughters surviving him. The deceased asset was L.R Muthambi/Chamuga/263 comprising of 3 ¼ acres which is occupied by the two administrators and one FRIDAH WANJIRU his niece.
6. The 1st administrator averred that he uses 2 ½ acres with his family comprising of his wife and their 4 children as he has no other land elsewhere. He proposed to give his sisters and 2 nieces whose parents are deceased 1 acre averring that all his sisters are married and stay at their husbands homes save Lucy Maitha, the 2nd petitioner and FRIDAH WANJIRU who he proposed each should get 0.10 acres as he has a permanent home, that her son has also constructed on the land and that he further purposed to give them the land at the back or at the river and have a road of access created for them.

7. On being cross-examined by Mrs. Ntarangwi learned counsel for the 2nd administratrix the 1st administrator stated that the deceased sisters are:- HELLEN GATUNE; PAULINE MUKAITI, MARITTA GANINI and MARY KANYUA. He testified that GATUNE had 3 children; that at the time of her demise she was staying with her parents and was buried at the deceased land. That the 1st administrator took her portion upon her death. He stated Gatune's daughters are married, but the son stays at Embu and he has a church. 1st administrator agreed that he is willing to give land to his nephew and nieces.
8. The 1st administrator stated that 2nd administratrix has no coffee trees on the land and that the trees on the land were planted by mother to FRIDAH WANJIRU. He also testified that his daughter PURITY KAWIRA has her own house on the deceased land and that there is unoccupied space at the flat part to the road but later changed his mind and stated that there is no unoccupied space. He testified that he is objecting to his sister having frontage to the road insisting they should get land at the river side or bottom of the land. He stated he would like his sister to get 1 acre and himself 2 ½ acres.
9. On being re-examined the 1st administrator testified that if the land is shared from top to the bottom his house or that of his daughter would be damaged. He also testified his sister and the children stay at his mother's house which is a temporary structure on the flat area.
10. OW2 testified that he knew the deceased family and his land. He testified that the 1st administrator and 2nd administratrix and her niece FRIDAH WANJIRU stays on the deceased's land. That the 1st administrator had several sisters, five of whom are deceased and the living ones are three being CHARITY, NJERI, who is divorced and LUCY MARITTA. He testified that the 1st administrator's house is made of timber and his daughter's home on the same area was constructed about 3 years ago. He averred if the land is shared from top to bottom the 1st administrator's house would be affected adding the land is sloppy. On OW2 being cross-examined by Mrs. Ntarangwi, learned advocate for the 2nd administratrix he testified that the portion offered to 2nd administratrix is not suitable for habitation, adding one house of the 1st administrator's family was constructed 2 years ago and that all the parties in this cause are settled in one place. On re-examination OW2 reconfirmed that all parties houses are in one place and the 2nd administratrix's house compound touches the tarmac. He added all the deceased children can occupy the flat top part adding the lower part is inhabitable. He added the deceased daughters who he is sure were never married were MARRITA, ZIPPORAH and HELLEN GATUNE. He gave the names of the deceased daughters who were divorced as NJERI and LUCY and that all the daughters of the deceased had children some of whom are married. On being re-examined further by Mr. Kahumbi, learned advocate for the 1st administrator OW2 testified that the deceased's land is narrow at the top to the road however he changed his mind and stated the top is wider than the lower part and that the flat part is bigger than the sloppy one.
11. The 2nd administratrix case is that the 1st administrator is her brother. That the deceased father had nine (9) children who the said administratrix listed in her affidavit and that the living ones including the two administrators are 4 namely GERRALD NJUE, RAEL NJERI, CHARITY UKIMA AND LUCY MAITHA (herself). She testified the deceased asset was L.R. MUTHAMBI/CHAMUNGA/263 comprising of 3.6 acres but the deceased gave his sister 0.60 acres leaving 1.3 hectares.
12. The 2nd administrator's proposal is that the land be shared in such a way that each of the deceased surviving daughters gets 1/2 an acre and the children of the deceased sisters; being the children of Zipporah Ithima namely FRIDAH WANJIRU and CHRISTINA KAGENDO ½ an acre; children of HELLEN namely JOYCE KAARI, CATHERINE GAKII and ALEX MUNENE 2 ½ an acre. That all in all the deceased's daughters to get 2½ acres objecting to the 1st administrators proposal of all the daughters and their children to get 1 acre but instead proposed that the 1st administrator

- gets 1 acre. The 2nd administrator testified that the land is sloppy but flat at the atop and the 2nd administratrix testified that the land should be shared from top from the road so that each of the beneficiaries gets a plot to construct a home adding she has a house near the road and the 1st administrators' houses are behind those of 2nd administratrix. She added that the daughter of 1st administrator constructed her house while this case was pending determination.
13. The 2nd administratrix further testified that their father shared his land during his lifetime and that the children of the 2nd administratrix sisters, she averred have been using their mothers share. That FRIDAH WANJIRU stay on her mother's share and that she has coffee and gravellier trees. That HELLEN GATUNE has coffee and gravellier trees and her brother stays at EMBU and has not been given his father's land contrary to 1st administrators allegation .
14. On the 2nd administratrix being cross-examined by Mr. Kahumbi, learned Advocate for the 1st administrator she testified that RAEL NJERI is sickly and cannot walk. That the 2nd administratrix stays on the land with the daughter of ZIPPORAH ITHIMA and also the 1st administrator. That the 1st administrator has 5 daughters. She also averred before the 1st administrator petitioned for grant of letters of administration intestate ZIPPORAH, herself and RAEL were in occupation of the deceased's land and that the only sister married in their family is CHARITY UTHIMA.
15. The 2nd administratrix testified those who have houses on the land are herself, FRIDAH WANJIRU, daughter of ZIPPORAH, GERRALD NJUE, and PURITY KAWIRA, daughter of GERRALD NJUE adding that however Gerald Njue demolished the house of RAEL NJERI leading her children to go away hence the 1st administrator started cultivating Njeri's and Gatune's portions of land. The 1st administrator denied that the daughters were given 0.10 acres.
16. The 2nd administratrix testified that one (1) acre is not enough for them as they need land where they can settle and cultivate urging that NJUE has another portion which he got from the deceased whereas others did not get any other land from the deceased. On the 2nd administratrix being re-examined by Mrs. Ntarangwi, learned advocate, she testified that the 1st administrator's family should remain on his share and averred that the land the 1st administrator referred to as owned by 2nd administratrix and RAEL were not acquired from the deceased. She testified that the 1st administrator took their aunt's land which the deceased had given her through litigation.
17. I have carefully considered the pleadings, affidavits in support and authorities relied upon by the parties and have purposely reproduced the parties respective evidence in support and in opposition of the different proposition on the scheme of distribution in this cause. The issue for determination is which of the two rival schemes of distribution submitted by the two parties is reasonable, fair and equitable in view of the evidence tendered before this court. In the instant case there is no dispute as to the deceased beneficiaries nor is there dispute as to the deceased assets. The issue is how the deceased estate should be shared.
18. The deceased had eight (8) daughters and one (1) son. The evidence called in this cause is that out of the eight(8) daughters only three(3) are surviving. That all the eight (8) daughters had children and that only one of the eight (8) deceased daughter CHARITY UTHIMA was married. That the deceased shared his land amongst his daughters during his life time. That the deceased daughters and their children occupy and use their respective portions as assigned by the deceased save the children of RAEL who were chased by the 1st administrator. In view of the uncontroverted evidence of 2nd administratrix and her witness I therefore do not agree with the 1st administrator; that all his sisters were married and only the 2nd administrator is in occupation of the land with him and his family. OW2 confirmed LUCY MAITHA and her niece FRIDAH WANJIRU uses the land. He also stated that he was sure MARIETTA, ZIPPORAH, AND HELLEN GATUNE were not married. He also added NJERI and LUCY were divorced.

19. **Section 3(2) of the Law of Succession Act** do not differentiate a child on the ground of sex. On distribution of the deceased estate amongst his/her surviving children Section 38 of the Law of Succession Act do not differentiate between daughters and sons contrary to the assertion by the 1st administrator daughter's that he should get a lion share because he is the only son of the deceased and the rest should get each 0.10 acres so but all the daughters and their children get 1 acre to share amongst themselves simply because they are daughters and married elsewhere. I have already found and held that only one daughter of the deceased CHARITY UTHIMA was married and the rest were not and those who were ever married have been divorced.

20. That further to the above if the deceased daughters were to be denied inheritance on the ground of sex and/or marital status this would be unconstitutional as **Article 27 of the Constitution** bars discrimination on the ground of sex or marital status. Section **27(1),(2),(3) and (4) of the Constitution of Kenya, 2010** provides:

27. (1) every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and Social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

21. I therefore find that the 2nd administratrix, her sisters and their children have all the time been recognized by the deceased as beneficiaries to his estate and entitled to respective portions which he had allocated to them during his life time. That even if they were not allocated any portions by the deceased which is not the case in this cause I also find and hold that they are entitled to share of the deceased estate with the 1st administrator.

22. Having considered the rival schemes of distribution proposed by the 1st administrator and the 2nd administratrix and having considered the evidence adduced before me, I find the proposal by the 2nd administratrix though it may not ensure equality amongst the beneficiaries to be fair, reasonable, and equitable taking into account the number of beneficiaries claiming though the 2nd administratrix and the fact that the 1st administrator had been given another parcel of land by the deceased and which fact he did not deny or challenge. Taking all that into account, it is obvious the 1st administrator is more favoured by the mode of distribution proposed by the 2nd administratrix. I want to add that equitable does not necessary mean equality amongst all the beneficiaries of a deceased estate.

23. I therefore order that the deceased estate be distributed as follows:-

(a) From top to bottom so that each of the administrator gets access to the tarmac road and the river taking into account of the flat part so that each of the administrator gets a place to put up residential houses and have access to the source of water. The current developments and especially houses/structures to be taken into account in sharing the land as herein below:-

(b) Land parcel Muthambi/Chamuga/263 be distributed as follows:-

- | | |
|-----------------------|------------------|
| i. Gerrad Njue M'Muga | 1. 30 acres |
| ii. Lucy Maitha Njiru | |
| iii. Rael Njeri | 2 acres to share |

iv. Charity Ukima
v. Joan Wanjiru
vi. Joyce Kaari

equally

(c) Each party to bear its own costs as the matter involves a brother and a sister over their father's estate.

DATED, SIGNED AND DELIVERED AT MERU THIS 16th DAY OF OCTOBER, 2014.

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:

- 1. Mr. Kahumbi for the 1st administrator**
- 2. Mrs. Narangwi for the 2nd administratix**

J. A. MAKAU

JUDGE