



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MERU**

**Succession Cause 289 of 2007**

**IN THE MATTER OF THE ESTATE OF M'MBOROKI S/O M'ARAJA .....DECEASED.**

**ZIPPORAH KABERE M'MBOROKI.....PETITIONER**

**V E R S U S**

**NAOMI M'MBOROKI.....OBJECTOR**

**Law of Succession Act**

- ü An estate of a polygamous union is distributed in accordance with the number of children in each house with the widows added as an additional units.
- ü A child born posthumously not less than nine months upon the death of the husband is not entitled to inherit the intestates estate.
- ü The Law of Succession Act [cap 160, Laws of Kenya) ss. 40

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

The later M'Mboroki s/o M'Araja died on 16.10.1971. He was survived by his two widows, and children comprised in the two houses-

**1<sup>st</sup> House**

1. Zipporah Kabere M'Mboroki - Widow
2. Joshat Gituma M'Mboroki - son
3. Naftaly Gitonga - son
4. Stella Mpinda - daughter – married

5. Jenniffer Mukami - daughter
6. Catherine Kambura - daughter – married

## **2<sup>nd</sup> House**

1. Naomi Mboroki – widow
2. Margaret Tirindi - daughter married
3. Esther Gacheri – daughter married
4. Joseph Mwirigi – son.

Following the death of the late Mbororoki M’Araja (the deceased) his second widow Naomi M’Mboroki was seduced and had sexual intercourse with one M’Nkanata Muriekega and one Harun Mukaria was the result of that liaison. The law of distribution of an instestate’s estate is governed by section 40 of the Law of Succession Act; (Cap 160, Laws of Kenya) hereinafter referred to as “**the Act**”

That section of the Act provides that where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children. Subsection (2) of the said section further provides that the distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with rules set out in Sections 35 to 38 of the Act.

Section 35 of the Act is the applicable rule in this case, the intestate deceased was survived both by his widows, and children enumerated above. Harun Mukaria, having been born eight years after the deceased’s death cannot be regarded as having survived the deceased M’Araja. After the death of their husband his widows were at liberty to re-marry, and if they did so the life interest they are entitled to upon his demise is determined and reverts to the deceased’s family members or his children. In this case Naomi M’Mboroki having had liaison with Nkanata Muriakega, who has acknowledged paternity and is willing to take his son, Harun Mukaria, has technically become re-married and her life interest to any part of the deceased’s estate should determine.

However, her co-widow, the Petitioner has proposed in her Affidavit for distribution that they both receive a life interest in the deceased’s net intestate estate. The Petitioner has excluded Harun Mukaria from the estate as not being a son of the deceased. That exclusion is in my opinion in order for a child born posthumously to a widow not less than nine months upon the death of the husband cannot be regarded as having survived the deceased and is therefore not entitled to inherit the net intestate estate.

The deceased estate comprised two parcels of land.

- (a) Title No. Nkubu Nthimbiri/Igoki/50 measuring 4.05 Hectares or 10.008 acres, and
- (b) Title No. Nkubu Nthimbiri/Igoki/317 measuring 1.43 hectares or 3.5321 acres.

Applying the rules in section 40 of the Act, and taking into account the number of children in each house and adding the surviving widow as an additional unit, there would be six (6) units in the first house, and four (4) units in the 2<sup>nd</sup> house, thus making a total of ten (10 units). If the net intestate is divided in accordance with the said formula, the first house would receive six units multiplied by the total area of land, and divided by the total units. Under the same formula the second house would receive four units of the deceased’s net estate. In figure form the area would be divided as follows:-

## **1<sup>st</sup> House.**

**Nkubu/Nthimbiri/Igoki/50**

$$6/10 \times 10.008 = 600048/10 = 6.004.$$

**2<sup>nd</sup> House**

$$4/10 \times 10.008 = 40032/10 = 4.0032/10$$

**Title Number Nthimbiri/Igoki/317**

$$1^{\text{st}} \text{ House } 6/10 \times 3.5321 = 21.1926/10 = 2.1192.$$

$$2^{\text{nd}} \text{ House } 4/10 \times 3.5321 = 1.284/10 = 1.4128$$

Under the above formula, the 1<sup>st</sup> house would receive a total of eight decimal one two four nought (8.1240) acres and the second house would receive five decimal four one six nought (5.4100) acres. So if each widow were given a life interest of one (1) acre from the portions to which each house were entitled under section 40 of the Act the net intestate available for distribution for the first house would get seven decimal one two four naught (7.1240) acres`, and that of the second house would be four decimal four one two eight (4.0032) acres in total from the two parcels of land.

The above formula would apply where the estate was being distributed to all the surviving children including married daughters. In this case it seems clear from the proposals for distribution by the two widows, the petitioner and the Objector that their respective daughters are blissfully married and do not claim any shares of their father's estate. The estate is therefore available for distribution among the deceased's surviving sons and their respective mothers (surviving widows). This being so, the proposals made by the Petitioner in her Affidavit sworn and filed on 3.03.2009 lends itself to both fairness and equity.

Harun Mukaria, a son of the 2<sup>nd</sup> widow (the objector) having been born some eight (8) years after the demise of the deceased, is clearly not a biological son of the decease. There is no secret that he is the biological son of one Nkanata Mureakega who has in an Affidavit sworn on 18.12.2008, acknowledged paternity and readiness to grant him a portion of his own land. Harun Mukaria cannot therefore in law claim to be a survivor of the estate of the deceased and does not qualify for distribution of the deceased's net intestate estate under Section 35 to 38 of the Law of Succession Act. He is therefore excluded from the distribution in this Ruling.

The residue of the deceased's net instate shall therefore be distributed as follows:

**A. L.R. NO. NTHIMBIRI/IGOKI/50**

- (i) Zipporah Kabere M'Mboroki – 1 acre life interest
- (ii) Naomi M'Mboroki - 1 acre life interest
- (iii) Josphat Gituma M'Mboroki - 2.5. acres
- (iv) Joseph Mwirigi M'Mboroki - 2.5 acres
- (v) Naftally Gitonga M'Mboroki - 2.5 Acres
- (vi) Road Reserve 0.508 acres

**Total 10.008 Acres**

**B Title Number Nthimbiri/Igoki/317**

- (i) Josphat Gituma M'Mboroki 1.178 Acres  
(ii) Joseph Mwirigi M'Mboroki 1.178 Acres  
(iii) Naftaly Gitonga M'Mboroki 1.178 Acres

**Total**                    **3.534 Acres**

There shall be orders accordingly.

**Dated, Delivered and Signed at Meru this 3<sup>RD</sup> Day Of July 2009**

**M. J. ANYARA EMUKULE**

**JUDGE.**