

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL APPEAL NO. 19 OF 2018**  
**IN THE MATTER OF THE ESTATE OF NJIRU CHIMBA alias NJIRU CIMBA**  
**(DECEASED)**

**TIRUS MWANIKI NJIRU.....APPELLANT/ADMINISTRATOR**

**-VERSUS-**

**JANE IGANDU.....RESPONDENT/  
PROTESTOR**

**JUDGMENT**

**Summons for Confirmation**

1. Following the judgment of this court delivered on 10<sup>th</sup> February 2021, the appellant being the administrator of the estate of the deceased, filed summons for confirmation dated 03<sup>rd</sup> March 2023. The summons was accompanied by a supporting affidavit stating that the deceased was survived by 3 children namely Tirus Mwaniki Njiru, Jane Igandu and Joseck Njue Njiru and 4 other dependants namely James Muchira Mwaniki, Brian Mugambi Mwaniki, Geoffrey Gachoki Mwaniki and Morris Muchangi Mwaniki.
2. The affidavit stated that the estate of the deceased comprised of land parcel number Kagaari/Kanja/1873 which the appellant proposed be distributed as follows:
  1. Tirus Mwaniki Njiru 1.5 acres
  2. James Muchira Mwaniki 0.5 acres
  3. Brian Mugambi Mwaniki 1.5 acres
  4. Geoffrey Gachoki Mwaniki 1.5 acres
  5. Morris Muchangi Mwaniki 1.5 acres

**Affidavit of Protest**

3. The respondent filed an affidavit of protest dated 08<sup>th</sup> June 2023 in which she contended that the children of the deceased were the following: Joseck Njue Njiru, Tirus Mwaniki Njiru, Jane Igandu Kariuki and Julia Gicuku (deceased). That Brian Mugambi Mwaniki, Geoffrey Gachoki Mwaniki and Morris Muchangi Mwaniki are not children of the deceased herein. Instead, she urged that they are sons of the

appellant who were born after the deceased had died in 1975, and therefore, they were not his dependants. She deposed that Joseck Njue Njiru was not interested in the estate and he had been discharged from the proceedings before the trial court. That the late Julia Gicuku had 2 children namely Patrick Mugendi Njue and James Muchira Mwaniki who is mentally incapacitated and is unable to follow the proceedings. She stated that the estate of the deceased comprises of land parcel number Kagaari/Kanja/1873 measuring 2.83Ha, and that it should be distributed as follows:

1. Tirus Mwaniki Njiru 0.94Ha
2. Jane Igandu Kariruki 0.94Ha
3. Patrick Mugendi Njue 0.47Ha
4. Jane Igandu Kariuki to hold in trust for James Muchira Mwaniki 0.47Ha

### **The Hearing of the Protest**

4. The protest was heard *viva voce*.
5. PW1 was the respondent/protestor who stated that she wished to rely on her affidavit of protest and statement as evidence-in-chief. She stated that she was married to Daniel Kariuki but they are now separated. She urged the court to distribute the deceased's estate three ways amongst herself, her late sister and the appellant. She proposed that she be given the portion due to her late sister's mentally incapacitated son in trust. On cross-examination, she stated that her father died in 1975 and she did not pursue succession because the traditional laws did not accommodate that and she was also married.
6. Further, she said that she is not divorced from her husband but is separated. That the court in its judgment delivered on 10<sup>th</sup> February 2021 acknowledged that the deceased died before enactment of the Law of Succession Act, thus its provisions could not be used to distribute the estate. Married daughters were not eligible for inheritance but they could inherit if the father wished for them to do so. She did not challenge the decision of this court at the Court of Appeal. She stated that the summons for confirmation of grant does not provide for distribution of the estate to the daughters of the deceased but it should provide for the grandchildren of the deceased, in this case, the children of the late Julia Gicuku.

7. PW1 was Morris Muchangi Mwaniki, son of the appellant and nephew of the respondent. He stated that the respondent was not named as a beneficiary of the estate of the deceased because she was married. He said that he knows the sons of his other aunt called Julia Gicuku should take the share of the inheritance that should have been given to her. On cross-examination, he stated that the deceased had 4 children namely Joseck Njue Njiru, Tirus Mwaniki Njiru, Jane Igandu Kariuki and Julia Gicuku (deceased). That the late Julia Gicuku was suffering from a mental infirmity before she died.
8. According to him, James Muchira was getting a smaller inheritance because he was mentally incapacitated. He stated that the respondent was not given any part of the estate because under Ki-Embu customary law, a married daughter of the deceased was not allowed to inherit from his estate. That the children of the late Julia Gicuku were adopted by the appellant and they will inherit through their adoptive parent.

#### **Submissions on the Protest**

9. The protestor submitted that the 2 sons of the late Julia Gicuku, a daughter of the deceased have not been provided for in the mode of distribution proposed by the appellant. It was her argument that the estate should be distributed to all the 3 children of the deceased and in the case of the deceased beneficiary, to her children. She relied on Articles 2(4) and 27(1) of the Constitution and the cases of **In Re The Estate of Lerionka Ole Ntutu (Deceased) [2008] KEHC 3913 (KLR)** and **Peter Karumbi Keingati & 4 others v Ann Nyokabi Nguithi & 6 others [2016] KEHC 1565 (KLR)**.
10. She further stated that the estate of the deceased ought to be distributed according to section 38 of the Law of Succession Act keeping in mind that the female children of the deceased should not be discriminated on any grounds. Further reliance was placed on the cases of **Stephen Gitonga M'murithi v Faith Ngira Murithi [2015] KECA 347 (KLR)** and **In the Matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] KEHC 1930 (KLR)**. She argued that the deceased's grandchildren whose parents died are entitled to an inheritance from the estate because their parent died.
11. The appellant relied on the cases of **In Re Estate of Nduati Mbuthia (Deceased) [2015] KEHC 3984 (KLR)** and **M'magiri M'mugira [2005] eKLR** and argued that

the distribution of the estate was already determined and it excluded the protestor on grounds of Ki-Embu customary law. He argued that the protestor lacked *locus standi* to protest against distribution because the estate had already been distributed excluding her and that distribution has not been set aside. He relied on the doctrine of *res judicata* per section 7 of the Civil Procedure Act and the case of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] KECA 102 (KLR)**. It was his argument that the protestor is attempting to revisit a matter that has already been adjudicated upon.

### Issues of determination

12. In my view, the issues for determination are:

- 1) Whether the summons for confirmation is rightly before this court; and
- 2) Given the Judgment of this court delivered on 10<sup>th</sup> February 2021, how should the estate of the deceased be distributed?

### Analysis and Determination

13. The judgment of this court on appeal was delivered on 10<sup>th</sup> February 2021 and is published as **Tirus Mwaniki Njiru v Jane Igandu [2021] KEHC 9241 (KLR)**. In it, this court stated as follows in its disposition:

***“29. Taking into consideration all the above, it is my considered view that the grant issued to the appellant herein ought to be revoked and a new grant issued. The proceedings leading to the confirmation of the same and the resultant certificate of confirmation ought to be set aside. Any transactions under the said grant ought to be declared null and void for all intents and purposes. Fresh summons for confirmation of the grant in compliance with all the requirements of Section 71 of the Law of Succession Act and Rule 40 of the Probate and Administration Rules should be filed and which application ought to be served upon the two sons of Julia Gicuku. The said sons, if dissatisfied with the proposals made in the application to be filed should be at liberty to file affidavits of protest making their own proposals on distribution and thereafter attend court on the date to be appointed for the hearing of the confirmation application to state their position.”***

14. It is on this context that the summons for confirmation of grant was filed and argued. Therefore, the appellant's argument that the estate had already been distributed is seriously flawed since the filing of such summons was advised by a decision of this very court. The summons for confirmation is properly before this court.

15. The dominant issue is how the estate of the deceased should be distributed. In its findings, this court had already indicated that given the date of the death of the deceased in 1975, the provisions of the Law of Succession Act would not apply since the commencement of the Act in 1981. This court stated as follows:

***“14. I note that the deceased died on 4/03/1975 and which was before the commencement of the Law of Succession Act. Under section 2(2) of the Act, the administration of his estate is subject to the Law of Succession Act though the distribution thereof is not governed by the Law of Succession Act but by written laws and customs applying at the time of the death of the deceased. (See in Re Nduati Mbutia (Deceased) (2015) eKLR). As such, section 38 of the Act (which deals with distribution of the deceased's estate where he died intestate and being survived by children) does not apply to the distribution of the estate herein.”***

16. This court's judgment pre-empted the determination of distribution as regards the applicable law. The protestor contended that her exclusion from inheritance was simply because the applicable laws at the time of death of the deceased did not favour her as a married daughter. The appellant stuck by this position and stated that the same position remains and that there is no basis for allocating property to a daughter of the deceased who got married. The Protestor also took issue with the fact that the appellant failed to provide for the children of her late sister who was survived by 2 sons. Through the judgment of this court delivered on 10<sup>th</sup> February 2021, the court directed that these 2 sons of the late Julia Gicuku be involved in the confirmation proceedings.

17. As already stated, the deceased herein died intestate on 04<sup>th</sup> March 1975, before commencement of the Law of Succession Act. This means that the estate is subject to distribution in accordance with section 2(2) of the Law of Succession Act which provides as follows regarding the period before commencement of that Act:

***“(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”***

18. In the case of **Philis Michere Mucembi v Wamai Muchembi [2010] KEHC 357 (KLR)** the deceased had died before the commencement of the Law of Succession Act. The court made the following observations:

***“Section 2(2) of the Law of succession Act clearly excludes the distribution of the estate of a person who died before 1st July, 1981. Such property must be distributed in accordance to the law of succession that was in place before the Law of Succession was enacted. On this point I am persuaded by the decision of my late brother Kamau Ag. J. in HCC Succession Cause No. 935 of 2003 (in the matter of the estate of Mwaura Mutungi alias Mwaura Gichigo Mbura (dcd) where he said that where the deceased died prior to the commencement of the Law of Succession Act the distribution of his estate is strictly governed by the applicable customary law, however the provisions of the law of succession act as provided under Section 2 (2) of Cap. 160 govern the administration of the said estate.”***

19. This distribution is further guided by Article 2(4) of the Constitution which provides:

***“(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”***

20. This means that even if Ki-Embu Customary Law is to be applied in distributing the estate, the same is only applicable in so far as it is consistent with the Constitution as the supreme law. That being said, DW1 testified that the protestor is not entitled to the estate because she is married and under Ki-Embu Customary Law, married daughters cannot inherit from their fathers. Article 27(3) of the Constitution provides:

***“Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”***

21. Should Ki-Embu customary law be left to fully guide distribution of the estate of the deceased? If so then, the respondent's inalienable right to non-discrimination will be violated in contravention of the Constitution. This is why, to the extent that Ki-Embu customary law on distribution of the estate discriminates against the protestor as a married daughter of the deceased, that law is held to be inconsistent with the Constitution. To that extent, such law is inapplicable in this case.
22. Customary law that creates discrimination in light of the Constitution is held to be unconstitutional and inapplicable. L. Kimaru J (as he then was) in the case of **Peter Karumbi Keingati & 4 others v Dr. Ann Nyokabi Nguithi & 3 others** [2014] KEHC 3563 (KLR) (supra) stated;

***“as regards to the argument by the Applicants that married daughters ought not to inherit their parents’ property because to do so would amount to discrimination to the sons on account of the fact that the married daughters would also inherit property from their parents’ in-law, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would be no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. ...This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which has a tendency of once in a while rearing its ugly head to be forever buried. The ghost has long cast its shadow on our legal system despite numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for those discriminative cultural practices against women be buried in history.”***

23. In light of section 2(2) of the Law of Succession Act there does not seem to be any other written law to guide this distribution, and so the court must resort to the common law to ensure equitable distribution of the estate. It is the role of the courts to endeavor that the bona fide beneficiaries of the estate get a part of it, one never having undue advantage against the others. It may also mean that all beneficiaries are provided for satisfactorily and more so, in an equitable manner.
24. In the **9<sup>th</sup> Edition Black's Law Dictionary**, '*equitable*' means '*Just; consistent with principles of justice and right; Existing in equity; available or sustainable by an action in equity, or under the rules and principles of equity*'. Sometimes, equitable may mean distributing the estate equally amongst the beneficiaries. (see the cases of **In re Estate of Lawrence Karianya M'Mukindia alias M'Mukindia M'Kairanya (Deceased) [2024] KEHC 454 (KLR)** and **In re Estate of Simon Munyua Muchira (Deceased) [2023] KEHC 22930 (KLR)**).
25. It has already been noted from the summons for confirmation and the affidavit of protest, that the deceased was evidently survived by 4 children namely Joseck Njue Njiru, Tirus Mwaniki Njiru, Jane Igandu Kariuki and Julia Gicuku (deceased). Through a ruling delivered on 07<sup>th</sup> May 2018, the trial court discharged Joseck Njue Njiru from the proceedings. Accordingly, and in the interest of justice and fair distribution, the estate of the deceased comprising in land parcel number Kagaari/Kanja/1873 measuring 2.83Ha should be distributed amongst the 3 children of the deceased who have an interest therein. This means that Tirus Mwaniki Njiru, Jane Igandu Kariuki and a representative of Julia Gicuku (deceased) should hold the land in equal shares. The 2 children of Julia Gicuku (deceased) namely Patrick Mugendi Njue and James Muchira Mwaniki, will thus stand in the place of their late mother and take up their mother's portion of the estate.
26. The protestor indicated that one of the children of the deceased beneficiary is mentally incapacitated and is unable to follow the proceedings. In that case, it is prudent that the protestor moves the court for the relevant guardianship orders so that the mentally incapacitated beneficiary's portion of the estate can be secured.

### **Disposition**

27. In light of the foregoing, I find that the protest has merit, and I make the following orders:

- 1) The grant issued to the appellant in the estate of the deceased be and is hereby confirmed;
- 2) A certificate of confirmation of grant shall be issued forthwith indicating that the estate of the deceased comprising of land parcel number Kagaari/Kanja/1873 measuring 2.83Ha shall be distributed as follows:
  1. Tirus Mwaniki Njiru 0.94Ha
  2. Jane Igandu Kariruki 0.94Ha
  3. Julia Gicuku (deceased) 0.94Ha which shall be inherited by her sons as follows:
    - a. Patrick Mugendi Njue 0.47Ha
    - b. James Muchira Mwaniki 0.47Ha
- 3) Finally, liberty is granted for a proper petition under the Mental Health Act to be made for guardianship in the case of James Muchira Mwaniki to enable ownership of his inheritance.

28. Orders accordingly.

**Delivered, dated and signed at Embu High Court this 8<sup>th</sup> day of October, 2025.**

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**R. MWONGO  
JUDGE**

**Delivered in the presence of:**

1. Ngigi for Protestor
2. Mwagiru holding brief for Kagio for Petitioner
3. Francis Munyao - Court Assistant

