



REPUBLIC OF KENYA



**In re Estate of M’rutere M’kirea (Deceased) (Succession Cause
130 of 2021) [2023] KEMC 298 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEMC 298 (KLR)

**REPUBLIC OF KENYA
IN THE GITHONGO LAW COURTS
SUCCESSION CAUSE 130 OF 2021
AT SITATI, SPM
DECEMBER 18, 2023
IN THE MATTER OF THE ESTATE OF M’RUTERE M’KIREA
(DECEASED)**

BETWEEN

JULIUS GIKUNDA PETITIONER

AND

BEATRICE MUKIRI 1ST PROTESTOR

SUSAN KAREA 2ND PROTESTOR

JERICAH KAGWIRIA 3RD PROTESTOR

JUDGMENT

1. The Petitioner filed a Summons dated 1st August, 2023 for the Confirmation of Grant supported by an Affidavit of similar date and a Consent Form dated 1st August, 2023 in which all but 3 protestors did not sign the consent. The proposed distribution of the Estate in the Summons was as follows:
 - A. LR Kibirichia/Kibirichia/4
 - i. John Mugambi Ruteere, Julius Mutuma Ruteere and Paul Murithi Ruteere to share 6acres equally.
 - ii. Jericah Kagwiria, Susan Karianki, Beatrice Mukiri, Sabella Mukiri, Zipporah Gitonga, Catherine Ntinyari Mwirigi, Harriet Kanana, Alice Kaburo Peter, Ruth Gacheri, Trustee of Nick Mutembe and Trustee Enner Nkatha =to share the remaining balance equally.
2. The 3 Protestors did not challenge the sharing of 2 acres each to John Mugambi, Julius Mutuma and Paul Murithi. Their Protest only related to the shares the daughters of the deceased. Their proposal



was that since the deceased had 2 widows Martha Tirindi (deceased) who was Mother to 4 children and Veronica Ruteere (deceased) who was Mother to 9 children, the remaining balance of the land should first go to the respective houses then the daughters inherit as follows:

- i. 1st house daughters: Jericah Kagwiria, Susan Karianki and Beatrice Mukiri= share 1 ¼ acres equally.
 - ii. 2nd house daughters: Sabella Mukiri, Zipporah Gitonga, Catherine Ntinyari Mwirigi, Harriet Kanana, Alice Kaburo Peter, Ruth Gacheri, Trustee of Nick Mutembei and Trustee Enner Nkatha= to share 1 ¼ Acres equally.
3. The Administrator and the rest of the beneficiaries opposed the Protest saying that the daughters ought to inherit equally as per the oral instructions of their father prior to his demise. They added that the father had also directed that the sons get 2 acres each and this was agreeable to all.
 4. The only issue to be decided is what is the correct sharing ratio for the daughters out of the LR Kibirichia/Kibirichia/4.

Determination

5. The applicable law for this issue is section 40 of the Succession Act which provides as follows:
 40. Where intestate was polygamous
 - (1) 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.
 - (2) 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 the rules set out in sections 35 to 38.
6. The full meaning and import of section 40 of the *Law of Succession Act* was extensively discussed by Mr. Justice William Musyoka in *Re Estate Of Shitemi Moyo (Deceased)* [2021]eKLR where the learned Judge had this to say:

“25. The Court of Appeal addressed this in *Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat* [2015] eKLR, where it said:

“From the consideration of sections 35, 40 and 42 of the *Act*, the broad principle of law which emerges is that where an intestate was polygamous, the estate, in the first instance, should be divided among the houses according to the number of children in each house adding a surviving wife as an additional unit taking into account any previous benefit to any house. Thereafter the estate devolving on any house is, subject to her life interest distributed by the surviving spouse in exercise of her power of appointment to each beneficiary taking into account previous benefit, if any, to any beneficiary. However, in the event that the life interest is terminated either by remarriage or death, then the net intestate estate devolves



upon a house is divided among the surviving beneficiaries equally subject to any previous benefit to any beneficiary.

Section 40 of the *Act* does not give discretion to a court to deviate from the general principles therein enunciated. Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to make adjustments to the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in trust..... The application of section 40(1) is illustrated by the case of *Catherine Nyaguthii Mbauni v Gregory Maina Mbauni*, Civil Appeal No. 34 of 2004 (Nyeri) [2009] eKLR where the Court shared the net intestate estate according to a ratio reflecting the number of units in two houses.”

7. Applying the above principles leads the court to consider that the 2 houses had the following units including the widows though they both be deceased:
 - a. 1st House of Martha: Jericah, Susan, Beatrice, John and Martha herself =5 units.
 - b. 2nd house of Veronica: Zipporah, Catherine, Harriet, Alice, Ruth, Rosemary, Julius, Purity, Paul and Veronica herself: 10units.
8. According to the agreed position by both the Administrators, the Non-Protesting Beneficiaries and the Protestors, the sons were to inherit 2 acres each as orally gifted to them by their deceased father prior to his demise. Section 42 provides:
 - “ 42. Previous benefits to be brought into account
Where—
 - a. an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
 - b. property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this *Act*, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”
9. In the result, the court deducts the sons from the application of section 40 within the meaning of section 42 which requires the court to consider what a beneficiary was gifted by the deceased prior to his demise. With this deduction, the 1st house will count as 4 units while the 2nd house will count as 9 units. The total units are, therefore, 13 units.



10. The consequence is that the remaining 2 ½ acres will be shared out equally to the 13 units as follows:
1. 1st house with 4 units = 2 ½ acres divided by 13 units first = 0.19 acres which is then multiplied by 4 units = 0.76 acres to the 1st house. From this the daughters of the 1st house will share equally.
 2. 2nd house with 9 units = 2 ½ acres divided by 13 units first = 0.19 acres which is then multiplied by 9 units = 1.71 acres to the 2nd house. From this the share that daughters of the 2nd house will share equally including the Trustee of Nick Mutembei and Trustee Enner Nkatha.
11. As for the sons, each will inherit 2 acres.

It is so ordered. Right of appeal is 30 days.

DATED, READ AND SIGNED AT GITHONGO THIS 18TH DAY OF DECEMBER, 2023

HON. T. A. SITATI
SENIOR PRINCIPAL MAGISTRATE
GITHONGO LAW COURTS

