

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT SUCCESSION CAUSE NO. 582 OF 2014

IN THE MATTER OF THE ESTATE OF WALTER KIUNGE

MUNDIA ALIAS KIUNGE S/O MUNDIA (DECEASED)

JUDGEMENT

1. The Petitioner/Applicants herein **JIDRAPH MUNDIA KIUNGE** and **HILARY KIMARU KIUNGE** filed in Court a Summons for confirmation of Grant dated **7th July 2023**. The Protestors **DAVID KARIUKI KIUNGE** and **PENINAH KAGURE KIUNGE** filed an Affidavit of Protest dated **26th June 2024**. The Protest was canvassed by way of Oral evidence.

BACKGROUND

2. This Succession cause relates to the estate of the late **WALTER KIUNGE MUNDIA** alias **KIUNGE s/o MUNDIA** (hereinafter '**the Deceased**') who died intestate on **9th March 2006**. A copy of the Death Certificate Serial Number **0120396** is annexed to the Petition for letters of Administration Intestate dated **22nd May 2014**.

3. The Deceased was survived by six (6) children namely:-
- (a) Jidraph Mundia Kiunge - Son
 - (b) Hilary Kimaru Kiunge - Son
 - (c) David Kariuki Kiunge - Son
 - (d) Esther Watetu Kiunge - Daughter
 - (e) Peninah Kagure Kiunge - Daughter
 - (f) Mirriam Waceke Kiunge - Daughter
4. The estate left behind by the Deceased consisted of only one asset being the parcel of land known as **RUGURU/GACHIKA/692** (hereinafter referred to as the '**Suit Land**')
5. Following the demise of the Deceased the Petitioner **David Kariuki Kiunge** applied for grant of letters of Administration Intestate. On **1st December 2014** the Court issued the Petitioner with the Grant. The Petitioner then filed a Summons for confirmation of Grant dated **4th September 2015**. The court issued a certificate of confirmation of Grant dated **2nd May 2016** which indicated the suit property was to be divided equally between the six (6) children of the Deceased.

6. The Applicant **Jidraph Mundia** then filed a Summons for revocation of Grant dated **23rd July 2021**, in which he alleged that the Grant issued to the Petitioner had been obtained fraudulently by failure to disclose material facts. He alleged that one of the Deceased's children **Mariam Waceke** was serving a life sentence in prison and therefore could not have signed the consent.
7. The matter was referred for Court Annexed Mediation and the parties initially reached a consensus. The record indicates that on **14th June 2023** the parties agreed **BY CONSENT** to compromise the Summons for Revocation of Grant in the following terms:-

“Jidraph Mundia Kiunge and David Kariuki Kiunge are hereby appointed administrators of the estate of the deceased to represent the interests of the Applicants and respondents in this case. The earlier grant is hereby revoked.

Any of the two or both jointly shall file an application for confirmation of Grant within 30 days.”

8. However despite this consent the parties were later unable to agree on the issue of distribution of the estate.
9. The Applicants insisted that the estate should be divided between only four (4) of the six (6) children of the deceased. They argued that the married daughters of the Deceased were not entitled to inherit any part of the estate.
10. On the other hand the protestors were adamant that the estate should be distributed equally between all the six (6) children of the Deceased. The court gave the parties more time to negotiate in an attempt to resolve the impasse but no agreement was reached. The court therefore directed that the Affidavit of Protest dated **26th June 2024** would proceed to hearing.

THE EVIDENCE

11. **PW1 David Kariuki** and **PW2 Peninah Kagure** objected to the proposal in the confirmed Grant dated **7th July 2023** that the suit land be divided amongst only **four (4)** out of the **six (6)** children of the Deceased. '**Peninah**' who was a married daughter of the Deceased insisted that as a biological child

she had an equal right to inherit the property left behind by her father.

12. **PW3 Miriam Waceke** denied that when the Deceased passed away she was serving a prison sentence and was in jail. She stated that when the Deceased passed away she was at home. She asserted her right to inherit the property of the Deceased. '**Miriam**' told the court that the consent was later brought to her and she signed it whilst in prison thereby confirming her agreement to have the estate divided equally between the six (6) children.
13. The Applicants **Jidraph Mundia Kiunge** and **Hilary Kimaru Kiunge** held the view that the suit land ought to be divided only between **Jidraph Kiunge, David Kiunge, Esther Kiunge** and **Hilary Kiunge**. They insisted that this reflected the wishes of their late father who had during his lifetime divided the land to the four children only. The Applicants stated that despite being a daughter **Esther Kiunge** was still entitled to a share of the estate as she was not married.

14. The Applicants further alleged that the confirmed grant dated **2nd February 2016** had not been properly issued as the beneficiaries had not all signed the consent. They state that they did not agree to have the estate divided amongst all **six (6)** children of the Deceased.
15. Upon conclusion of the oral evidence the parties were invited to file and exchange their final submissions. The Applicants filed the written submissions dated **27th June 2025** whilst the respondents relied upon their written submissions dated **22nd April 2025**.

ANALYSIS AND DETERMINATION

16. I have carefully considered the Affidavit Protest before this court, the evidence adduced by the witnesses as well as the submissions filed in court. The two issues which arise for determination are;-
- (i) Whether the Deceased left behind a will.
 - (ii) How the estate should be distributed.

(i) Whether the Deceased left behind any will

17. It is common ground that the Deceased passed away on **18th March 1994**. The names and identities of the six (6) children who survived the Deceased are also not in any dispute. The Applicants told the court that it was the wish of the deceased that his land devolve only to **four (4)** out of his **six (6)** children. **DW1 Jidraph Kiunge** stated that the Deceased during his lifetime told him how he wished his property to be divided and even went so far as to state that the Deceased had already allocated his land before he died.
18. It is trite law that he who alleges must prove.

Section 107 of the **Evidence Act, Cap 80 Laws of Kenya** provides as follows:-

“Burden of Proof”

- (1) Whoever desires any court to give judgement as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

(2) When a person is bound to prove the existence of any facts it is said that the burden of proof lies on that person.”

19. The law provides that any person may during his/her lifetime indicate how they wish their property to be distributed after they die. These wishes can be expressed through a written or an oral will. The courts upon proof of the existence of a written or oral will uphold the declared wishes of the Deceased.
20. Whereas the Applicants state that the Deceased clearly indicated his wishes concerning the distribution of his estate, no will either written or oral was availed to the court. **Jidraph** himself admits under cross-examination that the Deceased did not leave behind a written will. Indeed no application for Grant of Probate with written will was made.
21. **Jidraph** also told the court that the Deceased during his lifetime told him how his land was to be divided and more specifically that the Deceased emphasized that none of his married daughters was to get a share of his estate.

22. In other words the witness was alleging that the Deceased made an 'Oral Will'. However there is no evidence from any third party who heard the Deceased make these utterances.
23. **Section 9** of the **Law of Succession Act, Cap 160 Laws of Kenya** which provides for oral wills states as follows:-
"9(1) No Oral Will shall be valid unless -
(a) It is made before two or more competent witnesses; and
(b) the testator dies within a period of three months from
the date of making the will."
24. As stated earlier the Applicants have not availed two (2) witnesses who heard the Deceased declare his wishes concerning his estate.
25. Secondly the court has not been told when i.e on what date the Deceased made this alleged oral will, thus it is not possible to tell whether the alleged oral will was made **three (3)** months prior to the demise of the Deceased as required by **Section 9(1) (b)** of the Act.

26. Accordingly I find that no evidence has been adduced to show that the Deceased left behind a written or an oral will.
27. The Applicant went on to allege that the Deceased had already distributed his land before he died. In other words they are alleging that the Deceased may have made a '**gift inter vivos**' to four (4) of his children prior to his death
28. **Blacks Law Dictionary 10th Edition** describes a '**gift Inter Vivos**' in the following terms.
- “Gift between the living relating to or involving property conveyed not by will or in contemplation of an imminent death but during the conveyors lifetime.”**
29. Therefore an order to qualify as a gift inter vivos it must be shown that the donor took all steps necessary to put the land in question into the possession and control of the donee. A gift inter vivos of land becomes effective upon execution and delivery of the transfer to the donee.
30. In **RE ESTATE OF GEDION MANTHI NZIOKA (Deceased)** [2015] eKLR the Court stated as follows:-

“.....Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts intervivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. (Emphasis added).”

31. In this case there is no evidence that the Deceased took any steps to convey the suit land into the possession of the four (4) beneficiaries. There are no minutes of a Land Control Board meeting attended by the Deceased. There is no evidence that Deceased ever executed and/or registered any transfer of the land in question to the four.

Indeed under cross-examination the Protestor admits that

“The Deceased did not leave a written will. The Deceased had transferred his land to 4 people. He had not transferred the land before he died.”

32. In short there is no evidence of any steps taken by the Deceased to convey this parcel of land into the hands of the alleged donees. I find no evidence that the Deceased had made a gift of this land to four (4) of his children during his lifetime and this allegation is hereby dismissed.

(ii) Distribution of the Estate

33. It is not in dispute that the Deceased in this matter died intestate. It is also not in dispute that the Deceased was survived by six (6) biological children.

34. The children of the Deceased are not in agreement regarding the mode of distribution of the estate. The Applicants propose that the estate be distributed only to **four (4)** of the children of the Deceased whilst the objectors who assert that the estate ought to be distributed equally between all the **six (6)** children of the Deceased.

35. The reason why the Applicants propose that '**Miriam Waceke**' be excluded as a beneficiary is because she had allegedly been sentenced to life imprisonment at the time when the succession cause was proceeding. That being in

jail she would not have signed the consent dated **4th September 2015**.

36. Firstly the fact that '**Miriam**' had been convicted and was in jail would not by any means exclude her as a beneficiary of the estate. The fact of imprisonment does not extinguish the right of **Miriam** to benefit from the estate of her own father. For as long as she is alive '**Miriam**' like all the other children of the Deceased is deemed to be a dependant of the Deceased in line with **Section 29** of the **Law of Succession Act** and just like the other children of the Deceased she is entitled to benefit from the estate.
37. Secondly '**Miriam**' herself was in court and testified in this matter. She was clearly **not** in jail as alleged by the Applicants. In her written statement dated **17th February 2025** '**Miriam**' stated that she was arrested in the year '**2007**' and remained in custody until **October 2024** when she was released from jail. That by the time the Deceased died in **March 2006** she was not in prison as alleged by the Applicant but was at home.

38. **'Miriam'** went on to state that the 1st Objector kept her fully apprised of the Succession cause relating to their father's estate. She confirms having signed the consent to the mode of distribution of the estate in which it was proposed that the estate be distributed equally amongst all the children of the Deceased.
39. **'Miriam'** stated that following confirmation of the Grant the 1st Objector brought to her for signature all documents relating to the subdivision of the suit land. That she was allocated a share of the estate and titles were issued. **'Miriam'** reiterates support for the proposal that the estate be distributed equally to all the **six (6)** children of the Deceased.
40. This court rejects the motion that **'Miriam'** is not entitled to benefit from the estate of the Deceased.
41. Secondly the Applicants contend that their sisters **Miriam Waceke** and **Penina Kagure** ought to be excluded as beneficiaries to the estate as both are married and live in their husband's homes. According to the Applicants only

Esther Watetu who is an unmarried daughter is entitled to benefit from the estate.

42. **DW1 JIDRAPH MUNDIA** in his evidence stated that the Deceased had told him that none of the married daughters was to inherit any land. This court has already found that the Deceased left no will expressing his wishes with respect to the distribution of his estate.
43. Secondly it is quite obvious that '**Jidraph**' fancies himself as superior to the other siblings by virtue of being the eldest son and that he envisaged the distribution of the estate on the basis of Kikuyu cultural norms. Indeed under cross-examination **DW1** states that

“Penina and Miriam should not be given land because they are married. In Kikuyu culture married daughters do not inherit land....”

In their submissions the Applicants assert that customary law is one of the sources of law in this country. However customary law will only be upheld and applied where it is not discriminatory or repugnant to natural justice.

44. **Section 3(2)** of the **Judicature Act Cap 8, Laws of Kenya** provides that

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

45. The manner in which the estate of a person who dies intestate is to be distributed is provided for by **Section 38** of the Law of **Succession Act** which provides as follows:-

“Where an intestate has left a surviving child or children but no spouse, the net 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.” [Own emphasis]

46. This law provides for **equal inheritance** for all the children of a Deceased person. Therefore all **six (6)** children of the Deceased have equal rights of inheritance. The attempt by the protestors and the Administrator to exclude their sisters as a beneficiaries on grounds that they are married cannot be supported by this court. The Kikuyu cultural norms by which married daughters are normally excluded from inheriting a share of their parents estate is not provided for under the Law of Succession Act.
47. **Section 38** of the **Law of Succession Act** which provides for the mode of distribution of an estate where the Deceased died intestate leaving behind a child or children but no spouse provides that the net estate is to be divided equally to the surviving children irrespective of gender and whether married or not.
48. In **RE ESTATE OF M’IRINGO KIRIGIA (Deceased) [2017] eKLR** a case on all fours with the present case the High Court stated as follows:-

“.....From his arguments, it is clear the objector is suggesting that the protestor is not entitled to a share of the Estate because she is a woman and more so a married woman. Such arguments are, to say the least are a worn out motion and do not have any place in modern day society. It is also vehemently frowned upon by the constitution of Kenya 2010 as well as the Law of Succession Act. See eminent literary work by W. M. Musyoka Law of Succession at Page 118 in relation to reference to children in the Law of Succession Act that;-

“Non discrimination of daughters

Reference to children does not distinguish between sons and daughters, neither is there distinction between married and un married daughters.” [Own emphasis]

49. Similarly in **RE ESTATE OF SOLOMON NGATIA KARIUKI (Deceased) [2008] eKLR Hon. Justice Makhandia** (as he

then was) rendered himself interalia thus:-

“The law of succession Act does not discriminate between the female and male children or married or unmarried daughters of the Deceased person when it comes to the distribution of his estate. All children of the Deceased are entitled to stake a claim to the estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were invoking an old Kikuyu customary law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father’s estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forgo their father’s inheritance because they are likely to enjoy inheritance of their husband’s side of the family.” [Own emphasis]

50. Finally on this point in **RE ESTATE OF ELIZABETH WANJIKU MUNGE (Deceased) 2015 eKLR** the court rendered itself as follows;-

“The provisions of Part V of the Act refer to “child” or “children”. They make no distinction as between sons and daughters or male and female children. No distinction is made on their marital status. The effect of this is that the estate ought to be shared equally among all the children of the deceased without considering their gender or their marital status. It should be shared equally between the sons and daughters, where reference to daughters includes those that are married. This is the position so long as the deceased died after 1st July 1981 and the Law of Succession Act applied to the estate.” [Own emphasis]

51. **Article 27(3)** of the **Constitution of Kenya** outlaws any form of discrimination on the basis of gender. **Section 38** of the **Law of Succession Act** is clear on equal distribution of

the net estate to all the surviving children of the Deceased. **Section 38** of the Act enshrines the principle of equal distribution of the estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried. The law of succession Act provides that all the children of the Deceased with the exception of those who have specifically waived their right to inheritance are entitled to a share of the estate.

52. I therefore find and hold that the mode of distribution proposed by the Applicants which excludes the married daughters of the Deceased is obsolete and outdated and has no place in modern Kenya. As such I do direct that the estate of the Deceased ought to be distributed to all **six (6)** children of the Deceased in **'equal shares'**
53. This court notes that this is a matter in which the Grant had already been confirmed on **2nd February 2016**. Under that confirmed Grant it had been provided that the estate be distributed equally. Following said confirmation the suit property was surveyed, and subdivided into six (6) portions and titles were issued to each beneficiary. The copy of the

mutation form as well as the six (6) Title Deeds issued to the beneficiaries appear as Annexure **DKK '6'** in the Respondents list of Documents dated **4th November 2024**. Therefore as things now stand the property known as **Ruguru/Gachika/692** no longer exists. It has already been subdivided and fresh titles issued. Based on the confirmed grant and having been issued with title to her share one of the beneficiaries **Penina Kagure** proceeded to sell her portion of the land.

54. In attempting to impugn the Grant which had been confirmed on **2nd February 2016** '**Jidraph**' alleged that he did not consent to the equal distribution of the estate and that he was not involved in the survey and did not consent before the Land Control Board.
55. However under cross-examination **DW1** admitted that he had initially agreed that the suit land be divided equally amongst all the **six (6)** beneficiaries and further confirms that he was present in court when the Grants was being confirmed. How then can the witness later claim that he was not a party to the decision to have the land sub-divided into

six (6) portions. **DW2** is clearly speaking from both sides of his mouth.

56. **DW1** further admits under cross-examination that he annexed to his statement a letter of consent from the Land Control Board to have the suit land sub-divided into **six (6)** plots. He confirms that he was present and that he signed that consent. In his own words **DW1** states

**“I signed the documents brought by the Surveyor
- David Kariuki told me to sign. I confirm I
personally signed the documents.”**

57. Having voluntarily signed the consent to have the land divided equally

the witness cannot now repudiate that consent. **DW1** has not alleged that he signed the said documents due to coercion, mistake and/or misrepresentation.

58. **DW1** claims that he was misled into signing the documents authorizing sub-division of the suit land into six (6) parcels. However he does not explain who misled him or how he was misled. This remains an unproven allegation. I find that **DW1** was fully aware of what he was consenting to. His

attempts to now disown the documents he signed cannot be given credence by this court.

59. **DW1** has not advanced to this court any valid reason why only **four (4)** of the Deceased's children should benefit from the estate. He has not shown how the mode of distribution proposed by the objectors will in any way prejudice him as a beneficiary.

60. Finally I note that this is a very old succession cause. The Deceased died way back in the year **1994** and the cause was filed **twenty (20) years** later in the year **2014**. A Grant had been issued and confirmed and the estate fully distributed with the consent of all the beneficiaries. Fresh title deeds were issued to each beneficiary. For reasons best known to themselves the Applicants now want to take everybody backwards by re-opening the issue of distribution for no valid and/or justifiable reason.

61. **Section 47** of the **Law of Succession Act** provides as follows:-

“The High Court shall have jurisdiction to entertain any application and determine any

dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient. Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

62. Likewise **Rule 73** of the **Probate and Administration Rules**

provides that

“73 Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

63. As things stand the Confirmed Grant issued on **2nd February 2016** was revoked by consent of the parties. In the circumstances and in the interests of moving this matter forward I hereby make the following orders:-

(1) That a fresh Grant be issued jointly in the name of the **Jidraph**

Mundia Kiunge, Hilary Kimaru Kiunge, David Kariuki Kiunge and Peninah Kagure Mwangi.

(2) I further direct that a Certificate of confirmed of Grant be issued jointly in the names of the four (4) above named Administrators.

(3) The property known as **RUGURU/GACHIKA/692** measuring approximately **6.9 acres** is to be shared '**equally**' between all six (6) beneficiaries of the estate as follows:-

<u>NAME</u>	<u>DESCRIPTION OF PROPERTY</u>
<u>SHARE OF HEIRS</u>	
DAVID KARIUKI KIUNGE) SHARED	LR. RUGURU/GACHIKA/692 TO BE EQUALLY
JIDRAPH MUNDIA KIUNGE)	"
HILARY KIMARU KIUNGE)	"
PENINAH KAGURE KIUNGE)	"
ESTHER WATETU KIUNGE)	"
MIRIAM WACHEKE KIUNGE)	"

64. This being a family matter each party to meet their own costs.

Dated in Nyeri this 22nd day of October 2025.

.....
MAUREEN A. ODERO
JUDGE

ORIGINAL