

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT FAMILY SUCCESSION CASE NO. 13 OF 2017

IN THE MATTER OF THE ESTATE OF ANNA NYATHAMA

(DECEASED)

MARY MUTHONI KARUE

RAHAB WANGUI GITAH

JOHN WANYIRI GAITIRIRA.....APPLICANTS

VERSUS

LYDIA WANJIRU GAITIRIRA

PROTESTOR

JUDGEMENT

1. Before this Court for determination is the Affidavit of Protest dated **24th July 2019** filed by **LYDIA WANJIRU GAITIRIRA** (hereinafter 'the Protestor'). The other Administrators of the Estate **MARY MUTHONI KARUE, RAHAB WANGUI GITAH** and **JOHN WANYIRI GAITIRIRA** (herein after 'the Respondents') all opposed the Protest.

2. The matter was disposed by way of oral evidence.

BACKGROUND

3. This succession cause relates to the estate of the late **ANNA NYATHAMA RODERICK** (hereinafter 'the **Deceased**') who died on **13th August 2012**. A copy of the Death certificate Serial No. **0016865** was filed in court on **8th May 2017**.
4. The Deceased was survived by the following persons:-
- (1) Mary Muthoni Karua - Daughter**
 - (2) Rose Wairimu Wahome - Daughter**
 - (3) Rahab Wangui Gitahi - Daughter**
 - (4) John Wanjiru Gaitirira - Son**
 - (5) Lydia Wanjiru Gaitirira - Daughter**
 - (6) Margaret Nyandia Gaitirira - Daughter**
5. The estate of the Deceased comprised the following assets:-
- (a) Konyu/Baricho/2112 measuring 2.44 hectares.
 - (b) Nyeri Municipality/Block 111/48 measuring 0.0297 Hectares.
 - (c) Nyeri Municipality/Block 1/739 measuring 0.3239 hectares

- (d) Nyeri Municipality/Block 1/740 measuring 0.3239 hectares.
- (e) Aguthi/Gatitu/667/67 measuring 0.0436 hectares.
- (f) East African Breweries shares - 5220 in number.
- (g) Barclays Bank Shares 8545 in number.
- (h) Kenya Commercial Bank Shares 2660 in number.
- (i) Monies held in account No. 0303850805 at Barclays Bank, Nyeri Branch.

6. Following the demise of the Deceased Grant of letters of Administration Intestate was on **30th April 2018** made to **John Wanjeri Gaitirira, Lydia Wanjiru Gaitirira, Mary Muthoni Karua** and **Rahab Gitahi**.
7. On **31st January 2019** three of the Administrators (excluding the Protestor herein) filed a Summons for Confirmation of Grant. The Protestor who did not agree with the proposed mode of distribution of the estate filed this Affidavit of Protest dated **24th July 2019**.
8. On **18th February 2019**, **Hon. Justice Jairus Ngaah** referred the matter for Court Annexed Mediation (CAM).

9. Following mediation the parties reached a Partial Mediation Agreement dated **25th March 2019** in the following terms:-

“MEDIATION PARTIAL AGREEMENT.

We, the undersigned parties have agreed as follows

1. Administrators to be JOHN WANYIRI GAITIRIRA, LYDIA WANJIRU GAITIRIRA, MARY MUTHONI KARUE and RAHAB WANGUI GITAHI.

2A. The following assets and shares be shared equally by the undersigned parties;

- 1. Land Title Konyu/Baricho 2.44 Ha (two decimal four four)**
- 2. Nyeri Municipality Block 111/48**
- 3. Plot No. 67/Block 667 in Ruringu**
- 4. Plot No. 18 measuring '40 by 40' at Nanyuki**
- 5. Plot at Kagochi Market measuring '30 by 30'**

2B. Shares

- 1. East Africa Breweries 5220 shares**
- 2. Barclays Bank 8145 Shares**
- 3. KCB Bank 2660 shares**

**4. Mathira Coffee Co-operative Society Bank
Account**

5. Barclays Bank Nyeri - A/C No. 0303850805

**2C. Nyeri/Municipality/Block 1/739 (0.3239 Ha)
being family home is not part of this agreement.
A decision on the same will be arrived at a future
date.”**

10. Following this Partial Mediation Agreement the parties entered in a

consent on the distribution of all assets save for the property known as **Nyeri Municipality Block 1/739**, (hereinafter referred to as '**the suit property**') That consent which was filed in court on **30th November 2021** was adopted as an order of the Court on **10th December 2021**.

11. Following this consent a certificate of confirmation of Grant was on

10th December 2021 issued to all four (4) administrators (including the Protestor). In that confirmed Grant the estate was to be distributed as follows:-

NAME	DESCRIPTION	SHARE
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	OF PROPERTY	OF HEIRS
Mary Muthoni Karue	- Konyu/Baricho/211	Equal Share
Rose Wairima	- Nyeri Municipality/Block 111/48	
Wahome	- Plot No. 48/3 in Nyeri Town	
Rahab Wangui Gitahi	- Plot No. 667 in Ruringu, Nyeri	
John Wanyiri Giatirira	- Plot No. 18 in Nanyuki	
Margaret Gaitirira	- Plot at Kagochi Market, Mathira Sub County, Nyeri County	
Rose Kamenju	- 5,220 East Africa Breweries Limited (EABL) shares	
Lydia Wanjiru Gaitirira	- 8545 Barclays Bank Limited (Absa Bank Ltd) shares	
	- 2,660 KCB Bank Limited shares	
	- Shares held at Mathira Coffee Cooperative Society	
	- Funds held at the Barclays Bank (Absa Bank) in account number 0303850805, Nyeri Town Branch	

12. As per the terms of the consent the question of distribution of the remaining asset being **Nyeri Municipality/Block 1/739** (hereinafter the '**suit property**') was to be determined by the Court. Hence the present hearing.

THE EVIDENCE

13. The Protestor **Lydia Wanjiru** relied upon her Supporting Affidavit

dated **18th June 2019** as well as her Supplementary Affidavit dated **14th October 2022**.

14. The Protestor opposes the proposal by her siblings to have the suit

property sold and the proceeds be divided equally between all the beneficiaries.

15. The Protestor states that since their mother (the Deceased) fell ill and

for the past **seven (7) years** she with the knowledge and permission of the Deceased has been maintaining the suit property which is the family home. That she has carried out significant development and renovations on the property. That she has modernized the property which is now being run as a guest house.

16. The Protestor states that she has all along paid all the statutory land

rates. That she has a sentimental attachment to the suit land which is the only home she knows unlike the other siblings who have set up their own homes elsewhere. The Protestor states that it is unthinkable to her that the family

home can be sold off and placed in the hands of strangers. She prays that she be given preferential rights to purchase the suit property.

17. The Protestor stated that she is ready to relinquish all other properties

allocated to her if the suit property could be allocated to her as her share of the estate. She states that as an unmarried daughter under Kikuyu customs she had the obligation to remain in the family home or to be allocated a plot to reside on.

18. **PW2 John Wanyiri Gaitirira** relied on his supplementary affidavit

dated **28th September 2023**. **PW2** told the court that his mother (the Deceased) lived with him for a period of **eight (8)** years before she passed away.

19. **PW2** states that during the period that his mother lived in his home,

she confided in him that she wanted the suit property to devolve to the Protestor who had assisted in the care of the

Deceased by hiring two (2) nursing aides at the cost of **Kshs. 50,000** per month.

20. **PW2** confirms that the Protestor had been maintaining the suit

property for several years and that she had renovated and modernized the same.

21. For the Respondents **DW1 Mary Muthoni Karue** testified and relied

on the Replying Affidavit dated **16th October 2019**. **DW1** stated that the family have held several meetings in an attempt to resolve the impasse over the suit property, to no avail.

22. **DW1** confirms that all the family members agreed on the mode of

distribution of the estate save for the parcel of land known as **Nyeri Municipality/Block 1/739**. That the beneficiaries agreed that the distribution of that parcel of land would be determined by the court.

23. **DW1** states that she was aware that the Protestor was cultivating

maize and beans on the suit land but denies that the Deceased ever bequeathed this property to the Protestor. She states that the Protestor never sought and/or obtained the consent or authority of the other beneficiaries to maintain and renovate the suit property. That in so doing the Protestor was intermeddling with the estate.

24. According to the Respondent they are all equally entitled to a share of

the suit property which is the family home. That the other beneficiaries have never benefitted from any of the profits which the protestor has reaped from the guest house which she developed on the suit property. At the close of oral evidence the parties were invited to file and exchange written submissions. The Protestor filed the written submissions dated **30th June 2025** whilst the Respondents relied upon their submissions dated **7th March 2025**.

ANALYSIS AND DETERMINATION

25. I have carefully considered the Protest filed in this matter, the replies

filed thereto as well as the written submissions filed by the parties. The only issue for determination is how the property known as **Nyeri Municipality/Block 1/739** should be distributed.

26. The Protestor has objected to having the suit property distributed

equally to all the beneficiaries. The basis of her objection is that she had single handedly maintained the said property which is the family home. That she has paid all the statutory rates. The Protestor states that she has gone to great expense to develop the suit property by renovating and modernizing the same converting it into a guest house and putting up an extension from which income is earned.

27. Finally the Protestor avers that as an unmarried daughter under Kikuyu

customary norms she is entitled to the home.

28. **PW2** has supported the position taken by the Protestor. He stated

that during her illness the Deceased told **PW2** that she wanted the family home to be left to the Protestor.

29. It must be remembered that the Deceased in this matter died intestate.

There has been no allegation much less any evidence that the Deceased left a written will. Indeed the Grant issued to the Respondents was a Grant of letters of administration **'intestate'**.

30. It is trite law that he who alleges must prove. **Section 107** of the

Evidence Act Cap 80 Laws of Kenya provides that:-

“107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of fact which he asserts must prove that those facts exists.

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

31. The claim by **PW2** that the Deceased intimated to him her desire that the suit property be left to the Protestor is not supported by any evidence. There is no evidence from any witness who heard the Deceased express such a desire.

Likewise there exist no evidence that the Deceased during her lifetime made to the Protestor a '**gift intervivos**' of the suit property.

32. It must be noted that at all material times the suit property was registered in the name of the Deceased upto the time of her demise. This is evidenced by the certificate of Title which was issued to the Deceased on **3rd July 1991**. At no time did the Deceased ever sell or transfer this suit property to the Protestor. The Protestor has claimed that she invested a lot in maintaining, developing and modernizing the suit property all with the full knowledge and consent of the Deceased.
33. No evidence has been presented to the court by the protestor to prove that the Deceased had permitted the Protestor to carry out any developments on her property. Neither was any evidence adduced to show that the other beneficiaries (the siblings of the protestor) had given their consent and/or authority to the Protestor to carry out developments on the suit land.

34. The suit property was the family home. If the Protestor wanted to develop or modernize the property then she ought to have sought and obtained the consent and authority of all the beneficiaries to carry out those developments. In cross-examination the Protestor admits that she never shared with any of the other beneficiaries any of the profits she had realized from running a guest house in the family home.
35. The Protestor states that she is ready to relinquish all assets allocated to her if the suit property could be allocated to her absolutely or in the alternative if the suit property is to be sold, the protestor seeks to be given priority option to purchase the same.
36. The Protestor pleads that the suit property holds sentimental value to her and she would hate to lose it. The suit property was the family home. I have no doubt that it holds sentimental value to all the other beneficiaries not the protestor alone. The Protestor does not have a greater entitlement to the suit property over her siblings. Although the protestor claims to have made great financial investment

into developing the suit property she has not adduced any evidence of such financial investment.

37. The Protestor submits that as an unmarried daughter she is entitled to inherit the family home under Kikuyu customs. Firstly the Protestor did not adduce any evidence e.g testimony from elders of his community to confirm this custom. Secondly the **Law of Succession Act** makes no distinction between the married or unmarried daughters of a Deceased person. **All children** of a Deceased person have an **equal right** to inherit under the law.

38. Finally I find that the Protestor does not have a greater claim to the suit property. The other beneficiaries are equally entitled to a share in the same. As such this court directs that;-

(1) The Property known as Nyeri Municipality/Block 1/739 will be shared equally amongst all the beneficiaries of the estate.

- (2) In the events the said property is to be sold the Protestor to be given priority option to purchase the same.**
- (3) This being a family matter each party to meet their own costs.**

Dated in Nyeri this 5th day of December 2025.

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MAUREEN A. ODERO
JUDGE