

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**(CORAM: R. MWONGO, J.)**  
**SUCCESSION CAUSE NO.508 OF 2002**  
**IN THE MATTER OF THE ESTATE OF NJAGI M'NGUNGI alias NJAGI M NGUNGI**  
**(DECEASED)**

JOHN KARIUKI MIRERA on behalf of the Estate of  
SERIA IGANDU.....APPLICANT/PETITIONER

**-VERSUS-**

SAMMY MUGO NJAGI.....PROTESTOR/RESPONDENT

**R U L I N G**

**Background**

1. The deceased died on 03<sup>rd</sup> July 1980. On 16<sup>th</sup> October 2023 an amended grant of letters of administration intestate was re-issued to Sammy Mugo Njagi and John Kariuki Mirera after the initial grant was revoked.

**Summons for confirmation of Grant**

2. The applicant, John Kariuki Mirera, one of the administrators, filed summons for confirmation of grant dated 05<sup>th</sup> December 2023. In it, he stated that the deceased was survived by Joseph Kariuki Mirera, Joseph Mugendi Mirera, Richard Muchira Mirera, Flora Muthoni Kamau, Agnes Werimba Mirera and Seroh Nyaguthii Mwai who are all nephews and nieces of the deceased. He stated that the estate of the deceased comprises of land parcel number Kagaari/Kanja/125 which he is proposing to solely inherit, other beneficiaries having signed a consent to this effect.

**Affidavits of Protest**

3. The respondent, Sammy Mugo Njagi, the other administrator, filed his summons for confirmation of grant which is deemed as a protest. He stated that the applicant is his maternal cousin who is now suing on behalf of his late mother, the previous administrator. He opposed the distribution proposed by the applicant. On his part he proposed that the estate of the deceased comprising of land parcel number Kagaari/Kanja/125 be distributed in equal shared amongst the 7 beneficiaries namely Robert Muriithi Njiru, Jennifer Kaari Njiru, Mary Wanjiru Nthiga, Francis Nyaga Njiru, Leadys Muthoni Silas, Alice Njoki Njiru, Danson Munyi Njiru and Sammy Mugo Njagi.

4. He stated that the applicant has no right to inherit from the estate herein because his mother inherited from her own husband's estate where her children still live to date. He stated that the people he has named are the ones in occupation of the land forming the estate and that they have extensively developed it.

### **Reply to Protest**

5. The applicant filed an Affidavit of Protest in response to the protest. In it he stated that the respondent is not a child or brother of the deceased and that even though he said that he was adopted by the deceased, there is no formal document as evidence of such adoption. His mother and the deceased herein were sisters and that does not give the respondent and his siblings the right to inherit from the estate.
6. He stated that the respondent and the people he is proposing as beneficiaries were not known to them until recently. He stated that this is the reason why the grant issued to the respondent was revoked in the first place; because he was not related to the deceased. He stated that the respondent has always introduced himself as a son of the deceased, which is false.

### **The Hearing**

7. The protest was heard *viva voce*.
8. PW1 was the respondent. He stated that the deceased is his uncle while the applicant's mother was his aunt. That he petitioned for a grant of letters of administration but it was revoked and then he was appointed co-administrator with the applicant. He stated that the deceased was never married and he was not survived by any children. That he lived in his father's home but he had a 5 acre piece of land namely Kagaari/Kanja/125. He said that since 1990, he has been cultivating the land of the deceased, sometimes with his siblings. That he relates poorly with the applicant and this explains why mediation efforts failed. The applicant was determined to take all that land and he indicated that he was not ready to share it with strangers. He stated that he took advice from the clan elders because he and the applicant belong to different clans.
9. According to him, the elders were of the view that the land be divided amongst him and his siblings as members of the clan. On cross-examination, he stated that the applicant has never cultivated the said land because his mother was married into a different clan. He stated that his biological father is Cyrus Njiru M'Ngungi and the deceased is his adoptive father who also gave him his own name. The deceased died in 1980, leaving him at 19 years old and in Form 4. He

said that the deceased got his land from the clan. That the applicant's mother lives on her husband's land in Nduuri.

10. PW2 was Mary Wanjiru Nthiga, PW1's elder brother, who stated that the deceased is her uncle and the applicant her cousin. She supported the position that the estate of the deceased should be divided in equal shares amongst PW1 and his brothers and sisters. She said that the land was acquired from the clan and it should be kept within the clan by leaving it to the respondent and his siblings. On cross-examination, she stated that she does not live on the deceased's land. That she supports that the land be given to her and her siblings because the deceased lived with her father during his lifetime.
11. PW3 was Francis Nyaga Njiru, a nephew of the deceased, who stated that his father and his uncle, the deceased herein, lived together. That they both cultivated the named piece of land until the deceased died and it was the wish of the deceased that PW3's father continues cultivating that land. That after his death, they continued using that land and that is why he proposed that they distribute it equally among the respondent and his siblings. On cross-examination, he stated that the applicant cannot inherit the land because he is from another clan.
12. PW4 was Jennifer Kaari Njiru who stated that the deceased, his father's brother left land parcel number Kagaari/Kanja/125. Before his death, he had told her father to farm the land to raise proceeds which he should use to provide for his children. Her father went on to use the land even after the deceased had died. She stated that the applicant and his siblings have no right over the property of the deceased because their late mother was married elsewhere and she had inherited land from her husband who was from a different clan. She also opposed the applicants proposition to inherit all of the deceased's estate solely. On cross-examination, she stated that her father is Cyrus Njiru Muruangungi while the deceased was Daniel Njagi M'Ngungi. That her grandfather was named with a clan name "Muruangungi" and he was given land by the clan.
13. RW1 was John Kariuki Mirera, the applicant, who stated that he is the deceased's nephew as his late mother was a sister to the deceased. He said that his mother was never given land by the clan because land was only being given to men. That the deceased did not have a wife or children. He stated that his mother, as the sister of the deceased and her children, are the closest relatives entitled to inherit from the estate according to the Law of Succession Act. That the respondent and his siblings do not reside on the deceased's land neither do they

cultivate it. Rather, that his mother was the one who was utilizing this land before she passed away.

14. He asserted that the respondent had misrepresented himself as a son of the deceased and it was on this basis that the first grant was revoked. He stated that his siblings had no problem with him being named as the sole beneficiary of the estate of the deceased. On cross-examination, he stated that when the clan was distributing land, he did not know that his mother was married. That is why he wants the portion that his mother would have received from the clan by taking the deceased's portion. He said that his mother was also pursuing the deceased's land for the same reasons and so he intends to pursue the same land on her behalf. That the respondents have never allowed him or any of his family members to till that land.

### **Parties' Submissions**

15. The applicant submitted that the respondent is seeking to benefit twice; from his father's estate and from his uncle's estate. That initially, the respondent's mother was not given land by the clan but now she is pursuing the deceased's land. He stated that the evidence proves that the respondent is already provided for through his own father's estate, his mother and siblings were never given clan land because they identified as members of a different clan and that equity demands that the deceased's share be given to the applicant's mother. He relied on the cases of **In re Estate of M'Ngarithi M'Miriti [2017] KEHC 7904 (KLR)** and **In Re Estate of Solomon Ngatia Kariuki (Deceased) [2008] KEHC 506 (KLR)**.

16. The respondent submitted that he and his siblings have proved on a balance of probabilities that they were dependants of the deceased within the meaning of section 29 of the Law of Succession Act. He also relied on section 107 of the Evidence Act. He urged the court to allow the protest and distribute the estate in the mode he proposed.

### **Issues for Determination**

17. The issues for determination are:

- 1) Whether the Law of Succession Act applies in this case;
- 2) How should the estate of the deceased be distributed?

### **Analysis and Determination**

18. On the first issue, the death certificate of the deceased herein indicates that he died on 03<sup>rd</sup> July 1980. This is not a contested point. It is also clear that he died

intestate and a grant of letters of administration intestate was issued in his estate. This is also not contested. The Law of Succession Act (LSA) indicates that it commenced on 1<sup>st</sup> July 1981 which is after the death of the deceased. Section 2(1) and (2) of the Law of Succession Act provides:

***“(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.***

***(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.” [Emphasis added]***

19. The import of these provisions is as follows: That where a deceased person died before the coming into force of the LSA, the estate shall be subject to written laws and customs applicable at the time; and that the LSA shall not be applicable. This is because a law cannot apply retrospectively. This was confirmed in the case of **Tabitha Wamutira Kinyua & another v Faith Nyawira Ng’anga (Sued as the Legal Representative of Gakuya Marira (Deceased)) & 3 others [2021] KEELC 2599 (KLR)** where the court held:

***“...In summary, the judgement appreciated the fact that the Plaintiffs and Defendants grandfather had passed away in the year 1959, prior to commencement of the Law of Succession Act, Cap 160. By dint of Section 2(1) of the Law of Succession Act, Cap 160, the provisions of the Act only apply to estates of deceased persons who died after 1st July 1981. Section 2(2) of the Act provides that estates of persons dying prior to the commencement of the Act are subject to the written laws and customs applicable as at the time of death...”***

20. When it is established that the provisions of the LSA cannot be applied to distribute an estate of the deceased, it becomes imperative that parties and their Advocates must place before the court evidence to prove distribution according to the applicable customary law at the time of the death of the deceased. In the case, **In re Estate of Kimayo s/o Shibeyi (Deceased [2020] KEHC 3908 (KLR))**, the court stated that:

***“It was never in dispute that the deceased died before the Law of Succession Act came into force. The person who filed the petition for representation on 1<sup>st</sup> July 2011, that is to say George Shakaba Hunter, the applicant herein, placed on record the original certificate of death in respect of the deceased, dated 8<sup>th</sup> August 1989, serial number 202843, which clearly indicated that the deceased died on 15<sup>th</sup> February 1972. That date, 15<sup>th</sup> February 1972, is also reflected in the affidavit that the said petitioner swore on 23rd June 2011, in support of the petition, and which he filed simultaneously with the petition. That being the case, it should be taken that he knew or ought to have known that the matter was going to be handled under section 2(2) of the Law of Succession Act, and not section 2(1) of the Act, meaning that the estate was to be distributed in accordance with the relevant customary law, and not Part V of the Law of Succession Act.... As stated above, the deceased herein died before the Law of Succession Act came into force. His intestate estate fell for distribution in terms of the applicable customary law, by dint of section 2(2) of the Law of Succession Act. The applicant should have known that when he filed his summons for confirmation of grant, dated 23<sup>rd</sup> November 2012, so that when he approached the hearing of the application, he was well aware of what he needed to do to prove the content of the applicable customary law, as required in Rule 64 of the Probate and Administration Rules and the dictum in Ernest Kinyanjui. Kimani v Muiru Gikanga & Another [1965] EA 735.” [Emphasis added]***

21. In essence therefore, this Court must readily hold and it is so held, that the LSA does not apply to this estate.

22. In this case, the deceased's death having occurred before commencement of the LSA, the court is called upon to analyze the evidence on the customs applicable at the time of his death to guide on distribution of the estate. However, the court can only rely of the evidence presented in court. Section 51 of the Evidence Act provides:

***“(1) When the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence if it existed are admissible.***

***(2) For the purposes of subsection (1) of this section the expression "general custom or right" includes customs or rights common to any considerable class of persons.*** [Emphasis added]

23. Therefore, in determining the second issue, the court will not apply the provisions of the Law of Succession Act. Rather, reliance will be placed on the viva voce evidence to enable the making of a finding on distribution of the estate.
24. PW1-PW4 stated that they lived with the deceased and their father before he died. They also stated that the deceased herein had been given a 5-acre piece of land namely Kagaari/Kanja/125 by the clan. PW1 stated that when he disagreed with the applicant, he consulted clan elders who were of the view that the land be retained within the clan. PW4 stated that the deceased's father was named "Murungungi" after his clan. It then followed that the deceased was given land after his father who was named after the clan. From this evidence, it emerges that the applicable custom at the time favoured the passing of/ inheritance of land within the clan.
25. PW1 testified that the protestor's late mother, Seria Igandu, was already married at the time of distribution of land by the clan. That she was married to someone who hails from a different clan and not the deceased's clan. That the applicant and his siblings, therefore, identify as a different clan and so they cannot be allowed to inherit from the deceased because they were not born within his clan. In any event, the deceased died leaving no children or spouse.
26. PW1-PW4 all stated that they had been residing on the deceased's land and had been cultivating on it since before he died: Further, that it was the deceased who had wished that they do so. That they also lived with the deceased before he died.
27. RW1, the applicant, testified that his mother, Seria was not given land because at the time, land was only given to male children born in the clan. He conceded that his mother was married to a person hailing from a different clan. However, he added that his mother deserves the piece of land given to the deceased since he, the deceased, had died. He also rode on the fact that the deceased did not have any children to inherit his land, and he felt entitled as a nephew, and he felt entitled as a nephew.
28. RW1 further stated that the respondent and his siblings had never allowed him and his siblings to access the said land to cultivate it. He indicated that he wanted the land because his mother never got any land when the clan was distributing land. That since the deceased had died whilst holding clan land, his mother

should have it. In his submissions, the applicant relied on the hierarchy of beneficiaries provided under the table of consanguinity in the LSA. Clearly, however, this hierarchy does not apply because the deceased died before the LSA commenced as provided in Section 2 (1) and (2), LSA.

### **Conclusion and Disposition**

29. The evidence by PW1-PW4 demonstrates, on a balance of probabilities, that the land making up the estate of the deceased was passed down from the clan; and that it was desirable at the time to have the said land remain within the lineage of the clan. In as much as the applicant's mother was a sister of the deceased herein, she got married into a different clan and it emerged that her husband had received land from his own clan. Indeed RW1, the applicant, testified that clan land was only being given to men, in addition to the fact that his mother identified as a member of a different clan according to his testimony. In light of this, the applicant has no customary foundation to inherit from the deceased given that inheritance is through lineage by clan. Therefore, the applicant is expected, under custom, to inherit from his father's clan and not from his maternal uncle who is the deceased herein.

30. In the result, I am of the view that the evidence adduced favours a determination in favour of the protestor. Accordingly, I find that the protest has merit and it should be allowed. It is hereby allowed.

31. Accordingly, it is ordered that land parcel number Kagaari/Kanja/125 shall be distributed in equal shares amongst the following beneficiaries: Robert Muriithi Njiru, Jennifer Kaari Njiru, Mary Wanjiru Nthiga, Francis Nyaga Njiru, Leadys Muthoni Silas, Alice Njoki Njiru, Danson Munyi Njiru and Sammy Mugo Njagi.

32. Orders accordingly.

**Delivered, dated and signed at Embu High Court this 22<sup>nd</sup> day of April, 2026.**

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**R. MWONGO  
JUDGE**

**Delivered in the presence of:**

1. Kahuthu for Petitioner
2. Githinji holding brief for N. Ithiga for Protestor
3. Stella Kithinji - Court Assistant