



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 361 OF 2014

IN THE MATTER OF THE ESTATE OF SAMUEL MURIUKI M'IBARA (DECEASED)

STELLA WAMBUI NGÁNGÁ1ST ADMINISTRATOR/APPLICANT

VERSUS

PETER KIOGORA KARERIA.....2ND ADMINISTRATOR/PROTESTOR

AND

FAITH MAKENA MWARIINTERESTED PARTY

RULING

Background

1. **Samuel Muriuki M'ibara (Deceased)** died sometimes on 28th March, 2004. His estate comprised of estate comprised of the following assets:

1) **Death gratuity**

2) **LR. No. Ntima/Igoki/6058**

2. **Stella Wambui (Applicant)** who described herself as daughter the deceased filed this cause and was on 23rd October, 2014 issued with Letters of Administration Intestate.

3. Subsequently on 21st January, 2015, a Certificate of Confirmation of Grant was issued distributing the death gratuity to the **2nd Administrator/Applicant**. The Certificate of Confirmation of Grant was on 31st January, 2017 rectified and both the death gratuity and **LR. No. Ntima/Igoki/6058** were distributed to the **1st Administrator/Applicant**.

4. On 07th July, 2017, **Peter Kiogora Kareria** in his capacity as brother to the deceased filed summons for revocation dated 06th April, 2017 and after hearing the parties, the court by an order dated 16th July, 2018 appointed Peter Kiogora Kareria and Stella Wambui as 1st and 2nd Administrators respectively.

PROTESTOR'S CASE

5. According to the 1st Administrator who is deceased's brother, deceased was neither married nor blessed with children. It is his evidence that he only came to know of the 2nd Administrator when she was brought home by his nephew who introduced her as the daughter of the deceased and came to know the Interested Party when she was enjoined as a party to this cause. He proposed that the deceased's estate be distributed solely to him.

6. In cross examination he confirmed that the 2nd Administrator is settled on deceased's land since 2014 and has a certificate of birth that shows she was born on 15th June, 1983 and Samuel Muriuki Ibara is indicated as the father of the child. He acknowledged that deceased had

a daughter namely Stella Mwendwa as indicated in the eulogies of his deceased mother, Salome Nyaroka, and deceased brother as granddaughter and daughter respectively but denied that the said Stella Mwendwa is the 2nd Administrator herein.

7. **PW2 Lillian Kaburu**, a sister to the deceased and 1st Administrator denied that 2nd Administrator was daughter to the deceased or taking care of her when she was young and described her as a stranger that had forcefully trespassed into the estate of the deceased and purported to be a beneficiary. **PW3 Esther Nkirote** and **PW4 Karen Gacheri Mborogo** who are deceased's sisters similarly stated that the 2nd Administrator is a stranger to the family. The sisters though confirming that 2nd Administrator has been in occupation of deceased's estate since 2014 stated that she was a stranger and supported the 1st Administrator's claim that deceased's estate be distributed to him. Concerning the Interested Party, the witnesses denied that she was daughter of the deceased and stated that they did know her until when she was enjoined in this cause. The 3 sisters similarly acknowledged that deceased had a daughter namely Stella Mwendwa as indicated in the eulogies of their deceased mother, Salome Nyaroka, and deceased brother as granddaughter and daughter respectively but denied that the said Stella Mwendwa is the 2nd Administrator herein.

8. **PW5 M'Rimbere Kiriinya** and **PW6 M'Mucheji Gikomene** though not related to the deceased stated that they knew him and that he worked as a nurse in various stations. They confirmed attending burials of deceased and that of his mother and there learnt from the eulogies that deceased had a daughter namely Stella Mwendwa.

INTERESTED PARTY'S CASE

9. **PW1 Faith Makena Mwari**, the Interested party stated that the deceased was her biological father born in Isiolo where deceased worked and her mother lived. In support of her case, she tendered photographs where the deceased holding her as a toddler, another of her parents together others of the deceased with her maternal aunts and one of the deceased outside his house. She also tendered her birth certificate as issued in 2012 showing that deceased was her father.

2ND ADMINISTRATOR'S CASE

10. **PW1 Stellah Mwendwa Muriuki** stated that the deceased is her biological father having met her mother in Nyeri and separating 4 months after her birth, he brought her to his mother (paternal grandmother) where she grew up in her care and that of her paternal aunts. She testified she got the name Stellah Karimi from her grandmother Salome Nyaroka and Stellah Mwendwa was given to her by her father. That she was later to go back to her mother who together with her then husband John Ng'ang'a named her Stellah Wambui Ng'ang'a. She produced her acknowledgment of birth notification for Stella Wambui **PEXH1**, child health card for Stellah Mwendwa **PEXH2**, class 2 exercise book for Stella Mwendwa **PEXH3**, certificate of birth for Stella Mwendwa issued in 2017, **PEXH4**, affidavit confirming her 3 sets of name **PEXH5**, statutory declaration confirming her 3 sets of name **PEXH6**, Salome Nyaroka's eulogy **PEXH7** which refers to Stellah Mwendwa as her grandchild deceased's, deceased's eulogy **PEXH8** which refers to Stellah Mwendwa as his daughter, photographs with relatives **PEXH9**, photographs of suit land **PEXH10**, Survey form from Mewass **PEXH11**, photographs of the Deceased's house and grave **PEXH12** and leaving certificate from Nairobi Aviation College **PEXH13**.

11. It is the 2nd Administrator's case that she has been in quiet occupation of deceased's estate since 2014 which she has developed and the same ought to be distributed solely to her.

12. Her witness **Lewis Mwirigi** who is son to **PW2 Lillian Kaburu** was surprised that his mother who had taken care of the 2nd Administrator as a child, his uncle and aunts would deny that 2nd Administrator was deceased's child. He supported the Administrator's case and stated that he knew and grew up knowing her as a daughter to his deceased uncle having been brought home by the deceased and had lived with them and also with the grandmother before she was again taken away by her mother and to later return as an adult. He stated that the 2nd Administrator is the Stellah Mwendwa whose name appears in the eulogies of his deceased grandmother, Salome Nyaroka, and deceased uncle Samuel Muriuki M'Ibara as granddaughter and daughter respectively.

13. **PW3 Robinson Muguna N'Ikiara**, another cousin to the 2nd Administrator emphasized that the that 2nd Administrator is the Stellah Mwendwa whose name appears in the eulogies of his deceased grandmother, Salome Nyaroka, and deceased uncle Samuel Muriuki M'Ibara as granddaughter and daughter respectively.

SUBMISSIONS

14. The 1st Administrator contends that the 2nd Administrator has not proved that she is daughter of deceased. He urged that the estate be distributed solely to him and in support thereof placed reliance **Re Estate of Patrick Mwangi Wathiga -deceased [2015] eKLR, Re Estate of Thambu Baimunda -deceased [2019] eKLR,**

15. In support of her case that she was deceased's daughter entitled to his estate, the 2nd Administrator placed reliance on **Re Estate of JCG (Deceased)[2018]eKLR.** In support of her case that she was also a daughter of the deceased, the Interested Party relied on the case law of **Joachim Ndaire Macharia V Mary Wangare & Another [2008] eKLR,**

Analysis & Determination

16. I have considered the evidence on record, submission and authorities cited by the parties and I have deduced the following issues for determination:

1) Whether the 2nd Administrator and Interested Party children of the deceased

2) **Beneficiaries of deceased's estate**

3) **Distribution of the Estate.**

Whether the 2nd Administrator and Interested Party children of the deceased

17. The 2nd Administrator and the Interested Party bear the burden to demonstrate that they are children of the deceased and thus entitled to a share of his estate. The standard and burden of proof provided by the Evidence Act ought to be discharged and he who alleges must prove. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya places the burden of proof on the party that alleges. It is incumbent upon the 2nd Administrator and the Interested Party to prove on a balance of probabilities that they are the biological children/dependents of the deceased.

18. From the evidence on record, I find that the 2nd Administrator has explained her three names with one of them namely Stella featuring prominently. Her evidence that she was introduced and lived with deceased's family is corroborated by numerous witnesses as summarized herein above. Of interest to note is that the 1st Administrator and his witnesses who are his siblings have not controverted evidence that the Stella Mwendwa as indicated in the eulogies of their deceased mother, Salome Nyaroka, and deceased brother as granddaughter and daughter respectively is any other person other than the 2nd Administrator herein. That no other person has come up claiming to be Stella daughter of the deceased gives credibility to evidence by the 2nd Administrator and her witnesses that there is no other Stella Mwendwa except her.

19. Whereas the 1st Administrator and his three sisters refer to the 2nd Administrator as a trespasser, they acknowledge that she has been in quiet occupation of deceased's estate since 2014 and has developed it. The evidence by the 1st Administrator and his sisters is mindboggling for the reason that land being an emotive issue, it is illogical that a total stranger could trespass onto land, and develop it as the persons having a claim over it look on without taking any action against her.

20. Having considered all the evidence not forgetting the evidence by the children of the deceased's siblings who refer to the 2nd Administrator as their cousin with whom they grew up leaves no doubt in the mind of the court that the 1st Administrator and his sisters are making an attempt to disinherit the 2nd Administrator who it has been demonstrated is a daughter of the deceased

21. I will tie the issue of the Interested party with the certificates of birth issued to the 2nd Administrator and the Interested Party.

22. The law relating to registration of births is to be found under Section 12 of the Registration of Births and Deaths Act which provides: -

“No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom.”

23. In **Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others (2014) eKLR** the Supreme Court held inter alia:

“The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue.”

24. From the evidence on record, there is no dispute that the certificates of birth to the 2nd Administrator and the Interested Party were issued long after the death of the deceased. However, the 1st Administrator has led no evidence to demonstrate that the said certificates were acquired by any other means other than as provided for in the law above. (See **BKN & another v TNW [2019] eKLR**).

25. From the foregoing analysis, this court makes a finding that the Certificates of birth for the 2nd Administrator and the Interested Party were lawfully issued and emboldens their evidence as analyzed above that deceased is their father.

Beneficiaries of the deceased.

26. Section 29 of the Law of Succession Act provides that:

For the purpose of this part dependent means-

a. The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

b. Such of the deceased's parents, step parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

c. Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

27. Having come to the conclusion that the deceased left two children, this court finds that the 2nd Administrator and the Interested Party are the rightful dependents of the deceased under section 26 of the Law of Succession Act and are entitled his estate to the exclusion of the 1st Administrator who though a brother is in the second degree of consanguinity to the deceased only entitled in the event that the dependents in the first degree are not existing.

Distribution of the Estate.

28. In the case of **Stephen Gitonga M'Mmurithi v Faith Ngira Murithi [2015] eKLR** , the Court of Appeal categorically emphasized that:

“...Cap 160 Laws of Kenya. Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender”.

29. It is apparent that both the 2nd Administrator and the Interested Party are entitled to an equal share of deceased's estate comprised in **LR. No. Ntima/Igoki/6058**. By a consent dated 03rd December, 2021 executed by the 2nd Administrator and the Interested Party in the presence of their advocates, the Interested Party renounced her right to an equal inheritance and is only interested in 1/8th acre of the estate with the balance going to the 2nd Administrator.

30. From the foregoing analysis, the orders that commend to this court, and which I hereby issue are that:

- 1) **2nd Administrator and Interested Party are children of the deceased**
- 2) **2nd Administrator and Interested Party are the sole beneficiaries of deceased's estate**
- 3) **LR. No. Ntima/Igoki/6058 shall be distributed as consented by the 2nd Administrator and Interested Party follows:**
 - a) **1/8 acre to FAITH MAKENA MWARI**
 - b) **Balance to STELLA WAMBUI NGÁNGÁ**
- 4) **The 1st Administrator shall bear the costs of this summons**
- 5) **Mention on 25th May, 2022 to confirm compliance with orders (3) above and for further orders**

DATED AND DELIVERED IN MERU THIS 31ST DAY OF MARCH 2022

WAMAE. T. W. CHERERE

JUDGE

APPEARANCES

COURT ASSISTANT - MORRIS KINOTI

FOR 1ST ADMINISTRATOR - MR. THANGICHIA FOR THANGICHIA M. DAVID & CO. ADVOCATES

FOR 2ND ADMINISTRATOR - MR. CARLPETERS FOR CARLPETERS MBAABU & CO. ADVOCATES

FOR INTERESTED PARTY - MR. ASHABA FOR MUTUMA GICHURU & ASSOCIATES