



In re Estate of John Muraya Githinji (Deceased) (Succession Cause 504 of 2011) [2022] KEHC 16947 (KLR) (20 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16947 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 504 OF 2011
RB NGETICH, J
DECEMBER 20, 2022
IN THE MATTER OF THE ESTATE OF THE LATE JOHN
MURAYA GITHINJI (DECEASED)**

BETWEEN

BEATRICE NYAMURWA MURAYA 1ST OBJECTOR

JOEL GITHINJI MURAYA 2ND OBJECTOR

JAMES GITHINJI MURAYA 3RD OBJECTOR

AND

ESTHER WANGUI MURAYA PETITIONER

JUDGMENT

1. The matter relates to the estate of John Muraya Githinji who died on February 22, 2002 domiciled in Molo - Nakuru County. Esther Wangui Muraya petitioned this Honorable Court for a grant of letters of administration intestate on September 20, 2011 in her capacity as wife of the deceased. Grant of Letters of Administration was issued to her on September 20, 2012.
2. Beatrice Nyambura Muraya filed summons for revocation of the grant on August 6, 2014 on the ground that the grant was obtained fraudulently through the concealment of material facts; that the Petitioner failed to disclose before the Court the existence of the deceased other 3 wives and their children and the existence of the deceased's will dated November 25, 2000; that the 2nd, 3rd, and 4th families were not consulted when filing the petition.
3. In response to the application for revocation of the grant, Esther Wangui Muraya filed a replying affidavit on September 3, 2014. She averred that the grant was issued by the High Court at Nakuru and there was no concealment of material facts. She further stated that the children of the 2nd and 3rd wife were aware of the filing of the succession and consented. She however denied the allegation that Cecilia



Nyakio (mother to Beatrice Nyambura) being married to the deceased. She averred that the deceased was survived by 11 children.

4. The beneficiaries discussed and by consent they agreed that the only issue for determination by the Court was the mode of distribution. On July 7, 2020 parties were directed to file affidavits on the mode of distribution and on December 3, 2020 further directions were taken to have the matter proceed through viva voce evidence.

Objectors' Hearing

5. The protestor availed 3 witnesses. PW1 James Githinji Muraya testified that the deceased was his father and Jacinta Wanjiku his mother who died before the deceased. His mother was the 3rd wife of the deceased, the petitioner Esther Wangui is the 1st wife with 9 children, the 2nd wife Salome Wanjiru had 4 children but later remarried and Cecilia Nyakio separated with one (1) child.
6. The objector testified that the Petitioner did not list all the children of the deceased in the letters of administration. He stated that on November 25, 2000, the deceased called Naftali Waigwa, his wife (deceased), his sisters and his aunties and spelt out his wishes on how the property should be distributed. He said Peter Gikonyo wrote down the deceased wishes. He produced the will Marked JG1 and urged the Court to distribute the estate according to the deceased wishes.
7. He further stated that the Petitioner left out some property belonging to the deceased and denied the deceased estate had debts. On cross-exam, he told the Court, Mau Summit 254 was to be distributed to the daughter but the same was not in the will.
8. PW2 Joel Githinji testified that he lives in Njoro and the deceased John Githinji is his father, and her mother is Salome Wanjiru. He stated that they were 4 siblings and he was allocated Plot 91 Muchorwe measuring 1 ½ acres. He is opposed to the distribution of the estate as proposed by the Petitioner on grounds that it is unfair and the 4th house has not been allocated property.
9. He further stated that the deceased had distributed his property before his death and added that the deceased left out some property which he indicated would be shared equally amongst the beneficiaries.
10. He further stated that the 1st wife has sold some assets and the Petitioner has allocated more property to the 1st house and denied that his siblings are not fathered by the deceased. He said Plot 5390 was to be shared by all beneficiaries but the same is occupied by the Petitioner and urged this Court to distribute the deceased estate equally and according to the deceased wishes.
11. PW3 Beatrice Nyamurwa Muraya testified that she lives in Molo, and the deceased John Muraya was his father. She said the deceased had 4 wives namely Esther Wangui, Salome Wanjiru, Jacinta Wanjiru and Cecilia Nyakeyo. She testified that her mother is Cicilia Nyakio who was the second wife and that she is deceased.
12. She further stated that the deceased called for a meeting and shared his property amongst all beneficiaries. He confirmed PW1'S evidence that Esther was present in the meeting.
13. She testified that she was allocated Plot No 125 Tayari Farmers but it is not in the will and his son John Muraya was also allocated a plot to be demarcated. She pleaded with the Court to distribute the property per the deceased wishes.
14. On cross-examination, PW2 stated that her mother Cicilia Nyakio was buried at her maternal grandmother 's home. She said she is the only child born of her father but she denied the allegation that her mother remarried after separating from her father. She said that she does not live in Block 2/25



neither has she constructed on the property as the same was given to her son. She said she was given Parcel No 1257 and her son John Muraya was fathered by her father and he is, therefore, her father's biological son.

Petitioner's Case

15. DW1 Esther Wangui Muraya testified she resides in Molo and the deceased was her husband having married in 1960 under the Kikuyu Customary Marriage and renewed marriage vows in 1994 under the Christian Marriage Act. She said they were blessed with 9 children and one is deceased.
16. She confirmed that the deceased had other children including Beatrice Nyamurwa whose mother is Cicilia Nyakio. She disputes that Cicilia Nyakio was a wife to the deceased. She also stated that Jacinta Wanjiru had 2 children James Githinji and Janet Wanjiru, she said Jacinta Wanjiru died when the children were young and she proceeded to take care of the children. She further stated that Philomena had one child Joel Githinji, though she remarried.
17. She testified the deceased had orally divided his property. That the deceased called Peter Gikonyo, Naftali Waigwa and her; and proceeded to distribute the estate orally to the beneficiaries. She said all beneficiaries were allocated land. She further stated that Molo Block 533/290 had a loan of Kshs 800,000/= at Microfinance Bank and the deceased repaid Kshs 400,000/= and she paid the rest. She further stated the deceased sold Muchorwe 57 and Nakuru Municipality Block 29/872.
18. She proposed that the estate be distributed as per her affidavit and stated that Mau Summit 533/290 and 1739 was given to her by the deceased. She further stated that Joel Githinji had sold a portion of land allocated to him and confirmed that she had sold some property to help in the repayment of the loan and payment of medical bills.
19. Directions were on February 24, 2022 for parties to file written submissions.

Objector's Submissions

20. Counsel for the objector filed submissions on March 17, 2022. He submitted that the Objector relies on impugned will dated November 25, 2000 which distributed the estate of the deceased to all beneficiaries.
21. Counsel further submitted that in the absence of the deceased's will, the estate be distributed in accordance with Section 40 of the *Law of Succession* and submitted that the Petitioner has favored her house and allocated a huge parcel of the estate to her children.
22. Further that, Beatrice and Joel are getting the minimum shares and denied that the deceased sold Plot No 57 Muchorwe Scheme to Kinyukia Self Help Group. The objector urged the Court to distribute the estate of the deceased in accordance with the Protestor's mode of distribution in which they propose the 8 plots be divided amongst the four houses while the agricultural parcels are divided equally amongst all the beneficiaries. That the sale of Plot 57 Muchorwe amounts to the intermeddling of the property of the deceased and the property should revert back to the estate and be distributed equally amongst the beneficiaries.
23. Counsel urged this Court to find that the deceased had 4 wives as the Petitioner recognized the Objectors as children of the deceased.

Petitioner's Written Submissions

24. Counsel filed submissions on July 14, 2022 and submitted that the deceased did not leave behind a will dated November 25, 2000. He submitted that the impugned will dated November 25, 2000 is invalid



and inconsistent with Section 11 of the Law of Succession Act; that the impugned will was not attested by two competent witnesses who witnessed the testator sign the will.

25. Further that the author of the will who was a neighbor was not called to adduce the will and the objectors failed to meet their burden of proof as required by Section 109 of the Evidence Act.
26. Counsel further submitted that the deceased was not married to Jacinta Wanjiru, Salome Wanjiru and Cecilia Nyakio as there was no evidence adduced by the objectors to show any subsistence of the marriage and further submitted that the Petitioner did not leave out the children of the deceased in the Petition; that the Petitioner has recognized the Objectors as children of the deceased and they have been given their share as per the deceased wishes.
27. Further that Melvin Kiarie, Stephen Kamau and John Kariuki are not children of the deceased as they are the children of James Mwangi and submitted there is no evidence adduced by the Objectors to prove the contrary.
28. Counsel submitted that the estate ought to be distributed as per the Petitioner's proposed mode of distribution and it is not disputed that the deceased called a meeting and expressed his wishes on how the property would be distributed, and the objectors Joel and James have confirmed to the court having sold part of the portions distributed to them and they cannot seek the assistance of the court to be allocated more property.
29. In conclusion counsel submitted that as per the proposed mode of distribution, the petitioner has not left out any property forming part of the deceased estate.

Analysis and Determination

30. I have considered the evidence adduced, pleadings and submissions filed and consider the following as issues for determination: -
 - i. Who are the legal beneficiaries of the estate of the deceased?
 - ii. Mode of distribution of the estate of the deceased.
31. The Petitioner's argument is that deceased did not have other wives; she contends that she is the only wife of the deceased as no customary marriage was conducted in respect to the other women herein. The Petitioner argued that she listed the children of Beatrice Wanjiru as beneficiaries of the deceased but her stand is that Beatrice is not a wife to the deceased. She also disputes the children of Cecilia and Salome as beneficiaries of the estate of the deceased.
32. She amended the list of beneficiaries and in the proposed mode of distribution, she lists all 14 beneficiaries as entitled beneficiaries. She stated the deceased had distributed his estate before his demise and each beneficiary took possession of their share of the estate.
33. The Petitioner recognizes the children of the other wives as children of the deceased as listed hereunder:
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 1. Esther Wangui Muraya's Children:-
 1. Jimmy Githinji Muraya
 2. Samuel Maina Muraya
 3. Martin Mwangi Muraya
 4. Naftali Waigwa Muraya



5. Rahab Njeri Muraya
 6. Alice Muthoni Muraya
 7. Susan Wanjiku Muraya
 8. Janet Wanjiku Muraya
 9. John Giathi Muraya
2. Cecilia Nyakio (Deceased)
 1. Beatrice Nyamurwa-daughter
 2. John Muraya (grandson)
 3. Salome Wanjiru Muraya's children are: -
 1. Joel Githinji Muraya
 4. Beatrice Wanjiru (deceased): -
 1. James Githinji Muraya
 2. Janet Wanjiru Muranya
34. The Petitioner having acknowledged all the children of the deceased, impliedly admits that the deceased had 4 houses. The petitioner and Salome wanjiru Muraya from the 3rd House are the 2 surviving wives.
35. The deceased having been polygamous Section 40 of the *Law of Succession Act* deals applies to the distribution of his estate: -
- Section 40 (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 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.”
- Section 40 (2): -
- “The distribution of the personal and household effects and the residue of the net intestate within each house shall then be under the rules set out in sections 35 to 38.”
36. From the evidence adduced before the court, the deceased had embarked on distributing his estate before his demise in the year 2000.
37. The Protestors oppose the mode of distribution as proposed by the Petitioner. They argue that the Petitioner has favored the 1st house. No evidence has been adduced to the effect that the deceased sold Plot 57 Muchorwe Scheme. I find the same ought to be shared equally amongst all beneficiaries.
38. Besides the deceased being a polygamous man who left behind 4 houses, John Muraya whom he sided with his daughter Beatrice Nyamurwa from the second house is added as one of his children making number of children 14. The deceased's property which remained undistributed by the deceased should be shared amongst the 4 houses Including surviving wife as additional unit; the ration being 10:2:2:2



Final Orders:

1. The deceased's property which remained undistributed at the time of his death to be distributed in the ratio of 10:2:2:2
2. Esther Wangui Muraya, Cecilia Nyakio, Salome Wanjiru Muraya and Beatrice Wanjiru representing 1st, 2nd, 3rd and 4th house respectively.
3. The property sold by the petitioner listed below to be taken into consideration in distribution as part of deceased's estate
 - i. Plot No 57 Muchorwe
 - ii. Plot 90 Muchorwa
 - iii. Plot No 91 Muchorwa
 - iv. Tayari farm plot measuring 50 by 150 ft
 - v. Plot No 2288 Kalenjin enterprises Half Acre
 - vi. Plot 1251 Tayari Farm Molo
39. Each party to bear own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER, 2022

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RACHEL NGETICH

JUDGE

**In the presence of:

Martin - Court Assistant

No appearance by parties.

