



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 6 OF 2014**

**IN THE MATTER OF THE ESTATE OF MUGO KIMANI MUTURA (DECEASED)**

**MARY MUGURE MAINA.....APPLICANT**

**VERSUS**

**MARGARET MUTHONI MUGO.....RESPONDENT**

**RULING**

1. Mugo Kimani Mutura died on 22<sup>nd</sup> March 2013. He died intestate, and according to the D.O. Molo Central Division's letter of 16<sup>th</sup> October 2013, was survived by wife - Margaret Muthoni Mugo, son - Stephen Kimani Mugo, son - David Karigi Mugo, daughter - Mary Anne Njambi.
2. Margaret filed cause No. 23/13 at Molo Senior Principal Magistrate's Court. Grant was issued on 3<sup>rd</sup> February 2014.
3. The assets listed where gratuity payments and from the consent filed by the other beneficiaries, her children, on 29<sup>th</sup> August, 2014, specifically Molo/Tayari Mau Summit Block B7/614 and Afya Sacco Savings.
4. Before the grant could be confirmed Esther Wangui Gachagwa through the firm of A. N. Geke & Company Advocates filed on 25<sup>th</sup> April, 2014 objection, claiming to be one of the widows of the deceased.
5. That appears to have been abandoned because the next thing was this Misc. Application filed by Mary Mugure Maina On 30<sup>th</sup> April 2014 through Waiganjo Mwangi & Co. Advocates. This was Summons for Revocation of Grant, under **Section 74 of the P & A Rules**.
6. Mary claimed that she too was a widow of the deceased. In my ruling delivered on 7<sup>th</sup> May 2020 I allowed the summons, revoked the grant and directed that a fresh grant to issue in both the petitioner and the objector's name. I also directed that either or both could file Summons for Confirmation of Grant.
7. The Petitioner (Margaret) filed Summons for Confirmation of Grant on 11<sup>th</sup> June 2020 through Tengekyon & Koske & Co. Advocates. She listed the estate to be;
  - i) Molo Mau Summit Tayari Block B 7/614
  - ii) Molo Mau Summit Tayari Block B2/07, B7/1338
  - iii) Death Gratuity from Ministry of Health.
  - iv) Savings from Afya Sacco.
8. At paragraph 9 of the Supporting Affidavit she depones that she did not declare the savings at Afya Sacco and 2 properties in the form P & A because according to her she was entitled automatically to inherit the both parcels of land and the savings at Afya Sacco.
9. That:
  - The death gratuity devolved to her absolutely as indicated by the deceased to his employer.

- Molo Mau Summit Tayari Block B 7/614 is where she resides and that ought to devolve to her absolutely.
- Molo Mau Summit Tayari Block B 7/1338 to devolve to her subject to Mary's disputed claim.

10. The Summons for Confirmation of Grant is supported by the consent of her children dated 10<sup>th</sup> June 2020 and her own Supporting Affidavit sworn on 20<sup>th</sup> June 2020.

11. The Respondent (Mary) also filed her affidavit making her own proposals on distribution.

12. In the same affidavit sworn on 29<sup>th</sup> June 2020 she deponed that Margaret had amended the form P & A 5 but had not included her as a beneficiary, that the grant in both their names had not been issued by the court. Further that she did not agree with Margaret's mode of distribution.

13. She proposed that plot 292 Tayari Farm Molo Mau Summit Block B7/614 to go to Margaret, B7/1338 to go to her, and the savings at Afya Sacco to be shared by both widows equally. She also proposed that each widow to hold the said property in trust for herself and her children.

14. I have carefully considered the two (2) affidavits and the record. The only issue for determination is; how should the estate be distributed between the two (2) parties.

15. For starters the joint Certificate of Confirmation of Grant was issued on the 7<sup>th</sup> May 2020.

16. Margaret produced her certificate of marriage to the deceased and letters from the chief Molo Central listing her as the widow of the deceased, and his children with her, all adults.

17. There was also a letter from the office of the Deputy County Commissioner Molo, dated 18<sup>th</sup> November 2013 to the Public Trustee showing that she was the legal wife of the deceased.

18. Mary Mugure Maina produced a letter from the Afya Sacco dated 7<sup>th</sup> March 2014 addressed to the Public Trustee stating that the deceased had nominated his wife, Mary Mugure Maina as beneficiary. The letter also stated that two (2) other persons including Margaret Muthoni Mugo had laid claim to the same, and all were advised to pursue the matter with the Office of the Public Trustee.

19. Mary however did not produce any evidence to show that she was the wife of the deceased or that they were married under any system of law. Neither did she produce any evidence to show any contribution on her part towards the purchase of the property where the deceased left her and her children. The evidence available was that she cohabited on the said parcel with deceased and bore three children.

20. It is my considered view that Mary does not fall within the ambit of **Section 3(5) of the Law of Succession Act** which states:

***“S. 3(5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”***

21. It is trite now that a widow cannot be equated with the children of her husband, and the 'wife' who comes long after the first wife cannot expect to be on the same standing as the 1<sup>st</sup> wife in terms of the contribution towards the acquisition of the assets of the estate. Mary is not a widow of the deceased. She lived with the deceased and they had children together. The property she lived on with the deceased was acquired by the deceased and Margaret. The share for her children can only be what their father's share would have been in that property. In all fairness, that would be half. Strictly speaking, that half would have been shared with the children of Margaret.

22. In the circumstances of this case what is evidently clear is that the children were children of the deceased whom he acknowledged and provided a home for them where Mary and the children lived. It is them who are beneficially entitled to a share of the deceased's estate.

23. To that end the estate will be distributed as follows;

(1) Margaret Muthoni Mugo – Plot 292 Tayari Farm Mau Summit Block B7/614

(2) B7/1338 to be shared equally between Margaret Muthoni Mugo and the children of Mary Mugure Maina;

JN minors in equal shares to be held in trust

RN by their mother and another Mugo Kimani

(3) Savings from Afya Sacco Ksh 100,000/= only to go to the children of Mary and the balance Kshs. 211,742/= to Margaret Muthoni Mugo absolutely.

(4) Death Gratuity to Margaret Muthoni Mugo absolutely.

(5) A partial Certificate of Confirmation of Grant to issue with respect to Margaret's share of the estate.

(6) For Mary's children, taking into consideration that her children are minors, she is required to avail a co-administrator for purposes of the continuing trust over the children's share.

(7) Orders Accordingly.

(8) Right of Appeal within 30 days.

**Dated this 5<sup>th</sup> February, 2021.**

**Mumbua T. Matheka**

**Judge**

**Delivered virtually this 11<sup>th</sup> day of February 2021.**

**Mumbua T. Matheka**

**Judge**

**In the presence of:**

Court Assistant Edna

For the Petitioners: Margaret Muthoni Mugo

Ms Wangari for Objectors