



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE NO.275 OF 2013
IN THE MATTER OF THE ESTATE OF NKABU KAIYANTHI alias NKABO KAIYATHI (DECEASED)

IN THE MATTER OF SUMMONS FOR RECTIFICATION

BETWEEN

ELIZABETH KAJUJU JOHNAPPLICANT

AND

THERESHA MAITI HENRY....PROTESTOR

RULING

1. The deceased's estate is comprised of land parcel LR. ABOGETA/U-KITHANGARI/144.
2. The Protestor is one of the three daughters of the deceased whereas the Applicant is wife to deceased's only son JOHN KAIYANTI NKAABU who is also deceased.
3. On 20th November, 2015, the certificate of confirmation of grant dated 13th November, 2014 was amended in the following terms:
 - a. **Philiscah Tirindi Selesio, Hellen Kathure Mathiu and Teresha Maiti Henry – 1.50 acres**
 - b. **John Kaiyanti Nkaabu 1.80**
 - c. **Patrick Kithinji – 1.80 acres**
 - d. **Augustino Mwirigi John – 1.80 acres**
 - e. **Zacharia Mutwiri -1.80 acres**
 - f. **Antony Mwenda Kayanthi- 1.80 acres**
4. On 29th June, 2017, the certificate of confirmation of grant dated 13th November, 2014 was further amended in the following terms:
 - g. **Philiscah Tirindi Selesio, Hellen Kathure Mathiu and Teresha Maiti Henry – 1.50 acres**
 - h. **Elizabeth Kajuju 1.80 acres on her own behalf and on behalf of Janerosah Karambu Miriti, Lucy Kiende John, Catherine Gaceri John and Hydah Kanana John**
 - i. **Patrick Kithinji – 1.80 acres**
 - j. **Augustino Mwirigi John – 1.80 acres**
 - k. **Zacharia Mutwiri -1.80 acres**

I. Antony Mwenda Kayanthi- 1.80 acres

5. By summons dated 08th July, 2020, the Applicant prays for orders that:

a. THERESHA MAITI HENRY (Protestor) be the sole administrator

b. The state be redistributed as follows:

i. Philiscah Tirindi Selesio, Hellen Kathure Mathiu and Teresha Maiti Henry - 1.50 acres

ii. Patrick Kithinji -1.80 acres

iii. Augustino Mwirigi John -1.80 acres

iv. Zacharia Mutwiri - 1.80 acres

v. Antony Mwenda Kayanthi - 1.80 acres

vi. Elizabeth Kajuju - 3.60 acres

6. The application is premised on the grounds among others that JOHN KAIYANTHI NKAABU the co-administrator and Zacharia Mutwiri are deceased.

7. The application is additionally supported by an affidavit sworn by the Applicant on 08th July, 2020. Annexed to it are certificates of death for JOHN KAIYANTHI NKAABU, the co-administrator and Zacharia Mutwiri which reveal that they died on 10th November, 2016 and 17th December, 2017 respectively.

8. The application is opposed by **THERESHA MAITI HENRY (Protestor)** vide her grounds of opposition dated 2nd November, 2020 and filed on 06th November, 2020. Seeing that the grounds of opposition raise issues of fact and the parties are unrepresented, I

invoked Article 159 of the *Constitution* that outlaws undue regard to technicality and treated the grounds of opposition as the response to the application and directed that the matter be heard by viva voce evidence.

Applicant's case

9. The Applicant's case is that she is entitled to the share of her deceased son Zacharia Mutwiri who according to her was unmarried and had no children. Applicant proposes to distribute the share to her 7 surviving children. Applicant confirmed that she had heard people claim that Zacharia Mutwiri was survived by a child but denied that she was aware that KELVIN MUNENE was Zacharia Mutwiri's son. Applicant's son PATRICK KITHINJI and daughter HYDAH KANANA JOHN similarly denied that they were aware that KELVIN MUNENE was Zacharia Mutwiri's son.

Protestor's case

10. The Protestor who is one of the administrators and daughter of the deceased opposed the application and asserts that the Applicant intends to sell whatever land will be distributed to her thereby disinheriting her four daughters and KELVIN MUNENE Zacharia Mutwiri's son. In support of her contention that KELVIN MUNENE is Zacharia Mutwiri's son, she produced a certificate of birth issued on 21st August, 2019. Her witnesses who included AUGUSTINO MWIRIGI JOHN and ANTONY MWENDA KAYANTHI, who are sons of the Applicant, contended that KELVIN MUNENE is Zacharia Mutwiri's son and faulted their mother for intending to disinherit him. LUCY NTAKIRA, stated that KELVIN MUNENE is son of Zacharia Mutwiri and her daughter Salome Gacheri.

Analysis and determination

11. I have considered the evidence on record and deduced the following issues for determination.

1. Whether THERESHA MAITI HENRY should be the sole administrator of deceased's estate

2. Whether the Applicant is entitled to absolute share of 1.80 acres

3. How should Zacharia Mutwiri's share of 1.80 acres be distributed

1. Whether THERESHA MAITI HENRY should be the sole administrator

12. It has been demonstrated that JOHN KAIYANTHI NKAABU the co-administrator is deceased. It would therefore in the interest of justice appoint **THERESHA MAITI HENRY** as the sole administrator of deceased's estate so that the distribution of the estate can be completed

2. Whether the Applicant is entitled to absolute share of 1.80 acres

13. As we have seen earlier in this judgment, the court distributed 1.80 acres to the Applicant to hold for herself and for her four daughters Janerosah Karambu Miriti, Lucy Kiende John, Catherine Gaceri John and Hydah Kanana John after it was satisfied that her spouse JOHN KAIYANTHI NKAABU was deceased and their sons had been apportioned a share of the estate.

14. The law on distribution where the deceased is survived by a spouse and child or children is to be found in Section 35 of the *Law of Succession Act (the Act)* which provides that:

1. Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

a. the personal and household effects of the deceased absolutely; and

b. a life interest in the whole residue of the net intestate estate (*Emphasis added*)

15. As we have seen earlier in this judgment, the court on 29th June, 2017, in strict compliance with Section 35 of *the Act* directed that the Applicant was to hold her spouse's share of 1.80 acres on her own behalf and on behalf of her four daughters named hereinabove.

16. From the foregoing, I find that the Applicant's application that 1.80 acres be distributed to her absolutely is untenable in view of the mandatory provisions of Section 35 of *the Act*.

3. How should Zacharia Mutwiri's share of 1.80 acres be distributed

17. The law governing inheritance by children is to be found in Section 35 of *the Act* and provides that:

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

18. The Protestor and her 3 witnesses maintain that KELVIN MUNENE is son of Zacharia Mutwiri whereas the Applicant and her two witnesses contend that he is not. A certificate of birth issued on 21st August, 2019 in the name of KELVIN MUNENE names Zacharia Mutwiri as his father and in the absence of evidence to the contrary, I find that the Protestor has established, on a balance of probability that KELVIN MUNENE is Zacharia Mutwiri's son. There being no evidence that Zacharia Mutwiri was married, I find that his share solely belongs to KELVIN MUNENE whose certificate of birth reveals that he is now 18 years.

19. In the result, it is hereby ordered **THAT:**

1. THERESHA MAITI HENRY is hereby appointed as the sole administrator of deceased's estate.

2. 1.80 acres that was to devolve to Zacharia Mutwiri (deceased) is distributed to KELVIN MUNENE

3. The Certificate of Confirmation of Grant issued on 29th June, 2017 be rectified accordingly

4. This being a family matter, each party shall bear its own costs

DATED IN MERU THIS 11TH DAY OF February, 2021

T.W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

Applicant - Present in person

Protestor - Present in person