



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CASE NO. 316 OF 2014

IN THE ESTATE OF M'KAUMBA M'MWIRICHIA

M'KANGUNYURU ALIAS KAUMBUTHU MWIRICHIA – DECEASED

FRANCIS KAAI M'TWERA.....PETITIONER

VERSUS

KARUGURU M'MUNGANIA.....1ST APPLICANT

EVANGELINE KARWITHA.....2ND APPLICANT

MARION NTIRINYA M'INANGA.....3RD APPLICANT

CECELIA MUKOMURIUNGI.....4TH APPLICANT

JUDGMENT

1. On the 30/07/2020 the court issued grant of letters of administration intestate to Mr. Francis Kaai M'Twera and Karuguru M'Mungania. That decision was the outcome of the objection mounted by the second administrator and three others on the basis that the 1st administrator, being a grandson to the deceased had no right to apply and be issued with a grant behind them and without their consent. In appointing the two administrators, the court time-lined them for filing the application for confirmation of the grant.
2. That order yielded the application dated 12/10/2020 which proposed that the only property of the estate be shared equally among the 5 beneficiaries to the estate being the four daughters and one son. That son is the father to the 1st administrator/respondent
3. The application was evidently filed by the 2nd administrator only who swore the affidavit in support thereof. The application invited a protest from the 1st administrator who then contended that being in possession of the entire land, he should in fairness and justice get a portion measuring 13.1 acres while the ladies get 1 acre each. The other basis of the protest is that those proposal to distribute part of the estate to his deceased father is not made in good faith but a ploy to disinherit him and that he was not consulted in coming up with the annexed consent hence the same does not bind upon him.
4. I have given due regard to both positions put forth by the parties in the two affidavits filed and the fact that parties opted to offer no submissions but left it to the court to make a determination based on the affidavits.
5. When it was so left to the court the court posed a question to Mr. Ringera whether he had advised his client on the formula of distribution of an estate in the absence of an agreement and he answered in the affirmative conceding that his client like all Kenyans must be prepared to live within the law. I appreciate and commend that as a candid and forthright position to be taken by a counsel as an officer of the court.
6. In distributing a decease's estate where the beneficiaries have not agreed otherwise, the law mandates that it be shared equally. Section 38 of the law of succession Act provides-

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.

7. The dictates is that the estate be shared equally among the children. With that statutory imperative in place, I do find the proposal by the 2nd administrator to be the just and fair one. To the contrary, the proposal by the 1st administrator seems buried in the illegal but stubborn patriarchal legacy by which children were viewed to be entitled differently based on their gender. It pursues the old and unacceptable belief that sons should get more than the daughters on the sole basis that they were born son. That is discriminatory and unconstitutional and to accede to the proposal by the 1st administrator would be for the court to violate a constitutional dictate.

8. The reason advanced by the 1st administrator, being that he has been and continues to be in occupation of the entire property can never be the reason to give him a bigger share. Indeed it surfaces to be the reason for him to get a smaller share because he has used and continues to use the asset in an unfair and unjust manner as against the other beneficiaries.

9. In addition, being a grandchild to the deceased, he can only benefit under the title of his father and not directly. It cannot be true that to distribute to his father as a beneficiary disinherits him. He needs a reminder that he stands in no equality with his aunties as far as the deceased estate is concerned. The court in **Re-Estate of John Musambayi Katumanga, deceased (2014) Eklr said -;**

“...grandchildren are not entitled to inherit from their parents provided their own parents, the children of the deceased, are alive and themselves taking shares in the estate”

10. In conclusion, I do find that in the end the proposal by the 2nd administrator contained in paragraph 7 of the affidavit in support of the application for confirmation is the fair, just and legal formula.

11. Accordingly I do direct that the grant of letters of administration issued to the two administrators on the 30th July, 2020 be confirmed on terms that the identified children of the deceased shall each get 3.42 acres of the property known as Nyaki/Giaki/190.

12. Let the certificate of confirmation of grant issue forthwith so that the certificate is implemented within 120 days.

13. Mention on 8/12/2021 to confirm compliance.

Dated, signed and delivered at Meru this 23rd day of July, 2021.

Patrick J.O Otieno

Judge

In presence of

Mr. Otieno C for Nyankeri for objector

No appearance for Ringera for applicant

Patrick J.O Otieno

Judge