



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 22 OF 2000

IN THE MATTER OF THE ESTATE OF M'RINGONYI KITHAMBI alias KITHAMBA MPUKO (DECEASED)

JULIUS MWONGERA M'INOTI.....1ST APPLICANT

ESTHER KANGAI MUTHAMIA2ND APPLICANT

LUCY NAITORE THIRARI3RD APPLICANT

FLORENCE NJOKI GITONGA.....4TH APPLICANT

KARIMI ITONGA5TH APPLICANT

ROSELINE MAKENA M'ITONGA 6TH APPLICANT

VERSUS

JULIUS KATHURIMA M'KITHAMBA1ST PETITIONER/RESPONDENT

JOSEPH MWITI.....2ND PETITIONER/RESPONDENT

JULIUS MWONGERA M'INOTI.....PETITIONER/APPLICANT

RULING

1. This matter relates to Summons dated 11/06/2019 for confirmation of grant of letters of administration intestate made to Julius Kathurima M. Kithamba and Joseph Mwititi on 8/12/2000 under **Section 71 of the Laws of Kenya of Succession act (CAP 160) Laws of Kenya.**
2. This application is supported by the affidavits of Julius Mwongera M'Itonga sworn on 11/06/2019 and 16/01/2020 respectively. He seeks that the estate of the deceased that comprises of L. R No. NYAKI/MULATHANKARI/494 (hereinafter '*the estate*') be shared equally against Joseph Mwititi Kithamba, Julius Kathurima Kithamba and himself. This is because the other beneficiaries have already been catered for. The topology of the estate does make it possible to distribute it to all the lawful beneficiaries of the deceased.
3. This mode of distribution was opposed by Joseph Mwititi vide his affidavit sworn on 30/09/2019. He stated that a clan meeting was held in the presence of all the family members, including the applicants and their representatives, clan members, neighbors and area administration on 20/01/2019. The decision was that the issue of distribution should not be revisited. The deceased left his estate to two of his sons despite him having twelve (12) children. Moreover, the estate is located on a sloppy area which is impossible to distribute amongst the deceased's twelve (12) children.
4. This application was heard through *viva voce* evidence.
5. **1st Applicant Julius Mwongera M'Itonga** relied on his affidavits sworn on 11/06/2019 and 16/01/2020 as his evidence. He told the court that the deceased was his grandfather for his father M'Itonga Kithamba was the deceased's son. He stated that Julius Kathurima is his cousin and Joseph Mwititi is his uncle. When the clan meeting was held he was present and participated but disagreed with their resolutions. He prays that the estate be distributed as per his proposal.
6. **Petitioner Joseph Mwititi** relied on his affidavit sworn on 30/09/2019. He stated that the Julius Mwongera attended the clan meeting but said nothing and refused to sign the minutes. There were thirty eight (38) people at the meeting but only seven (7) people signed. If the estate is shared amongst three people claiming they will get 0.50 acres considering it is located on a very sloppy area. His father's wish was

that his two sons get the estate as it is very small.

7. The Applicant's counsel submitted that the deceased was survived by twelve (12) children who are entitled to the estate. The Respondents have made claims as heirs of their fathers who were entitled to have a share. Therefore, the estate be distributed equally amongst the beneficiaries of the estate who have claimed. He relied on **Estate of Veronica Njoki Wakagoto (deceased) [2013] eKLR** to support his submissions.

8. The Petitioners submitted that the Applicant has from time immemorial never used, possessed or developed any part of the estate herein. The grant was confirmed on 12/02/2007 and it was only in 2014, seven (7) years later that the Applicant raised an issue which had already been dealt with by the family. The fact that no other child of the deceased has made claim tells a lot about the way the deceased bequeathed his estate, that is to the two petitioners. Thus, the *status quo* should not be disturbed as it has been prevailing since 1967.

9. The issues for determination are whether the Applicant is entitled to a share of the estate of the deceased being he is the grandson of the deceased from the son and whether his proposal as to how the estate is to be distributed is fair and just.

10. **Section 38 of the Law of Succession Act** 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.”

11. The deceased died on 17/03/1976 being survived by his twelve (12) children. The 1st Petitioner and 1st Applicant are grandchildren of the deceased, representing their fathers M'Ikanda Kithamba and M'Itonga Kathamba. Pursuant to section 38 of the Law of Succession Act. The father of the Applicant would be entitled to a share of the deceased herein as a son. Being that he is now deceased his share of the estate should devolve to his spouse and children in equal shares.

12. According to Julius Kathurima M'Kithamba in his affidavit sworn on 24th July 2018, the deceased left parcel of Land No. Nyaki/Mulanthankari/494 to his father M'Ikandi Kithamba and his uncle Joseph Mwit. The reason he gave in his affidavit is that it is his father M'Ikandi who took care of the deceased in his old age and that the Applicants father and other sons were away when the deceased pronounced his wishes on the ownership of his estate. He annexed minutes of a family meeting held on 20th January 2019 to support his position that no other family member had a claim over the suit land. He averred further that Chief Thiora and the Area Administration was involved when the deceased made his wishes that his two youngest sons would inherit the suitland.

13. When this matter came up for hearing Chief Thiora and Julius Kathurima did not attend court to testify and none of the people who alleged to have participated in the family meeting of 20th January 2019 came to court. There is therefore, no sufficient reason to deny the Applicant herein the inheritance that belong to his father as the law does not provide that one must take care of their parents in order to inherit their estates. There is also no requirement that one must be in occupation of deceased's estate in order to inherit.

14. The minutes of the family meeting held on 20th January 2019 cannot be used to disinherit a rightful heir to the estate considering those who are alleged to have been present in 1976 when the wish was made by the deceased did not come to court to testify.

15. When the Executive Officer visited the estate he made a report dated 20/05/2019. He stated that the estate is located on a sloppy area subdivided into two. On the right, it is occupied by Joseph Mwit and his family and from his observations the homestead has been in existence for over a period exceeding twenty (20) years. The other portion is the homestead occupied by Julius Kathurima and his family. He concluded that the two are the ones who have developed and are in occupation of the same. The Applicant did not deny that he is not in occupation of the suitland but he claimed that Julius Kathurima had persuaded him and his mother and siblings to go and occupy LR. Ruiiri/Rwarera/1419 in lieu of what they were entitled to on LR. No. Nyaki/Mulanthankari/494.

16. The Applicant was sued by 1st Petitioner Julius Kathurima in Meru CMCC No. 17 of 2010 where he sought that the Applicant and his siblings be evicted from the said parcel of land and the Trial magistrate delivered her Judgment on 25th October 2018 dismissing the suit against the 1st Petitioner and allowing the Applicants counter claim based on the evidence of four witnesses including the Village Elder to the effect that Charity Kioja M'Tonga the mother of the Applicant was taken together with her children to occupy parcel no. 1419 in lieu of the portion in LR. No. 494 which her husband was entitled to. The Trial Magistrate made an order compelling the 1st Petitioner, Julius Kathurima to transfer LR Ruiiri/Rwarera/1419 to the Applicant as it was established that he was the beneficial owner.

17. The 1st Petitioner was aggrieved by the determination and he preferred Meru HCA No. 118 of 2018 challenging the judgment in Meru CMCC No. 17 of 2010. The said Appeal is still pending before the Court and the Petitioners did not update this court of its status.

18. To cushion the Applicant against the uncertainty of the Appeal above, this court finds that the Applicant is entitled to a share of Nyaki/Mulanthakari/494 and therefore this court upholds his proposal as to mode of distribution.

19. In the event that the Appeal upholds the magistrates decision then the applicant and the 1st Petitioner can engage and exchange the respective parcels of land following due process.

20. The estate herein comprising of LR. Nyaki/Mulathankari/494 shall therefore be shared equally between Julius Kathurima M'Kithamba, Joseph Mwit and Julius Mwangera M'Itonga who shall hold his late father's share in trust for himself and his siblings to share equally.

21. Costs of the protests to be borne by each party.

HON.ANNE ADWERA ONG'INJO

JUDGE

DATED AND DELIVERED AT MERU VIA EMAIL THIS 24TH DAY OF SEPTEMBER 2020.

HON.ANNE ADWERA ONG'INJO

JUDGE