



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO 401 OF 1994

IN THE ESTATE OF M'GUATU M'ITANIA – DECEASED

M'MWIRICHIA M'GUATUPETITIONER

-versus-

CECERINA KAROKI M'GUATU.....OBJECTOR

JOSPHINE KAGIRI M'TURUCHIUINTERESTED PARTY

JUDGMENT

Distribution of estate

1. Before me is a Summons for Confirmation of Grant dated 18/11/2019. The grant of letter of administration intestate to be confirmed was made to CECERINA KAROKI M'GUATU and M'MWIRICHIA M'GUATU on 30/10/2019. The application is grounded upon the supporting affidavit of CECERINA KAROKI M'GUATU and other grounds expounded in the submissions.

2. Whereas the ultimate function of a probate court is to distribute the estate of the deceased, the inextricable functions thereto are; (1) ascertainment of the estate property; and (2) identification of the rightful beneficiaries.

Estate property

3. The first assignment is to ascertain the estate property. As the parties agreed, I find and hold that the only property of the deceased is KIIRUA/NAARI-MAITE/505 measuring about 3 acres.

Beneficiaries

4. Second, I will ascertain identity of the beneficiaries of the deceased. From the papers filed in court, the deceased was polygamous. He had three houses made up as follows:

1st House – Nchooro (deceased)

- i) John Talia (deceased)
- ii) Salome Nkirote (deceased)
- iii) Sarah Rugura

2nd House Nthira (divorced)

- i) M'Mwirichia M'Guatu

3rd House

- i) Cecerina Karoki M'Guatu – widow
- ii) Anastancia Karimi M'Guatu – daughter

iii) Cecilia Kaimuri – daughter

iv) Domenica Makena M'Guatu –daughter (deceased but represented by Robert Muneje and Fridah Kanena – Grand children

v) Geosgina Kathambi – Daughter

vi) Patrick Nyamu M'Guatu – son

5. The above were confirmed during the hearing to be the beneficiaries of the estate of the deceased. I so find and hold.

Distribution

6. The Petitioner has proposed that the estate property be distributed as follows:

i) Ceceerina Karoki M'Guatu and her children – 2 acres

ii) M'Mwirichia M'Guatu – ½ acre

iii) Josphine Kagiri – ½ acre

7. The Objector proposes the estate property to be distributed to her and her children entirely. She claimed that the deceased in his death bed made an oral will in the presence of 8 people including the petitioner, the late Talia (son) and 5 neighbors in which he bequeathed the estate property to the petitioner and her children. She claimed that the deceased had provided Talia (son) with land at Giantune and that the objector had his own land which he was assisted by the deceased to acquire through allocation of land. This latter land is adjacent to the estate property. She averred that two witnesses namely, Francis M'Arimi and Elijah M'Arimi support her account of the will.

Oral will

8. According to section 8 of the Law of Succession Act: -

8. Form of wills

A will may be made either orally or in writing.

9. An Oral Will is valid, if: -

i) it is made before two or more competent witnesses; and

ii) the testator dies within a period of three months from the date of the making of the will.

See section 9 of the Law of Succession Act: -

9. Oral wills

(1) No oral will shall be valid unless-

(a) it is made before two or more competent witnesses; and

(b) the testator dies within a period of three months from the date of making the will:

Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.

(2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by sections 18 and 19.

10. Evidence by the objector, Francis M'Arimi and Elijah M'Arimi was consistent on the following:

i. That during one of the Meru rain seasons (March and October) the deceased convened a meeting;

ii. Other than the deceased, there were 8 people in the meeting namely; the Petitioner, Talia, objector, Francis M'Arimi, Elijah M'Arimi, M'Nkoroi, Kaburu or M'Ringera and Cosmas M'Thuraniira

iii. That the deceased bequeathed the estate property to his wife, Ceceerina and her Children.

iv. That the deceased stated that he had given land to the Petitioner and Talia each;

v. That the deceased was ill at the time and died shortly thereafter.

11. I note that the Petitioner also alluded to some will pursuant to which he distributed the estate of the deceased. See paragraph 12 of his affidavit dated 22/4/1998 and which he spoke to in his evidence. He also stated that his father had asked him before he died to ensure Josephine Kagiri gets a refund of her purchase price. I do note that the objector's witness stated that the deceased asked the petitioner and Talia to ensure Josephine Kagiri's purchase price was refunded. He even referred them to some Asian – perhaps money lender – who would lend them money for that purpose. From these matters and the fact that the objector and her witnesses seemed trustworthy to me, proves that the deceased convened the meeting in which he made an oral will. It is clear the will was made during one of the Meru rain season. And, evidence show that the deceased died soon after the meeting in which he made the oral will. The oral will was made in the presence of 8 competent witnesses. Therefore, I find that the deceased made a valid oral WILL in which he bequeathed the estate property to the objector and her children.

12. He had good reasons in giving the estate property to the objector and her children only: (1) he had given land to Talia- I note the family of Talia has not made any claim to the estate; and (2) as he could not get a second allotment of land, he assisted the petitioner to be allocated land by the Committee. The petitioner in his testimony acknowledged this fact. The petitioner lives with his family on the land.

Third Party claim

13. Be that as it may, the deceased sold ½ acre out of the estate property to Josephine Kagiri except that he was annoyed when the said Josephine sued him on the sale transaction. In fact, all parties agreed that Josephine was living on the ½ of land before the deceased died, still lives on and has extensively developed the said land. The status of the sale transaction of the land between the deceased and Josephine is, nonetheless, not clear. But she is in occupation of the land. The ever alert sixth sense of justice would not allow an orthodox disruption of the rights of this third party without due process having been given an opportunity. I will therefore tap from the law that allows such portion of land which cannot be dealt with in the confirmation of grant hearing, to be set aside for due determination of the claim by Josephine by a competent court. Accordingly, I set aside ½ acre on which Josephine's house and development lie to enable the ownership wrangle thereof to be determined by a competent court. See rule 41 of the Probate and administration Rules. This court should however be cautious not to allow an open-ended window to her; she must initiate appropriate proceedings against the personal representatives of the deceased within 3 months from today and fast-track the suit. For the avoidance of doubt, should she fail to initiate appropriate legal proceedings in the period allowed, any party may apply for orders.

14. I have decided to deal with that aspect of this case before I make the final order of confirmation because, once the grant has been confirmed, rule 41 of the Probate and Administration Rules may not be applicable.

Distribution

15. Back to distribution of the estate. I have made a finding that the deceased made valid oral will. I have also made a finding that the deceased gave Talia land and assisted the petitioner to be allocated the land he lives on and which is adjacent to the estate property. The petitioner attempted to lie to the court that he lives on the estate property in the hope that the claim will solidify his quest for a portion of the estate, yet, his own affidavit reveals he has lived on his land all the time relative to these proceedings. He admitted on oath that his father talked to the committee and he was allocated the land. These are relevant matters and valid reasons for not providing for the petitioner and Talia in his oral will. See section 28 of the Law of Succession Act of some of the matters a court considers in making any order in succession causes, to with: -

(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;

(e) the conduct of the dependant in relation to the deceased;

(f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

(g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

16. The upshot of my analysis is that the following orders commend themselves to the court: -

I. The ½ acre in KIIRUA/NAARI-MAITE/505 on which Josephine Kagiri lives and has developed is hereby set aside in accordance with rule 41 of the Probate and Administration Act, for the ownership tussle thereof between her and the personal representatives of the deceased to be determined in appropriate legal proceedings to be initiated by Josephine Kagiri within 30 days of today.

II. That the balance of KIIRUA/NAARI-MAITE/505 after (I) above shall go to Cecerina and her children in equal share. I have noted Cecerina seems to discriminate against her own daughters.

III. Accordingly, the grant is confirmed in the above terms.

IV. This being a dispute involving close family members, each party shall bear own costs of the proceedings. It is so ordered.

Dated and signed at NAROK this 14th day of December, 2020

F. GIKONYO

JUDGE

Dated, signed and delivered at Meru this 16th day of December 2020

T. W. CHERERE

JUDGE