



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 785 OF 2012

IN THE MATTER OF THE ESTATE OF M'IKOME M'MATIRI ALIAS IKOME MATIRI (DECEASED)

LAWRENCE KIAMBI KIOME..... PETITIONER

VERSUS

MADARINA NGUGI MWITL.....OBJECTOR

JUDGMENT

1. **M'IKIOME M'MATIRI (“the deceased”)** died intestate on 1st January 1992. On 11th December 2012 Lawrence Kiambi Kiome petitioned for letters of administration. The grant was made to him. He cited NKUENE/NG'ONYI/102 measuring 1.444 Ha and ABOGETA/NKACHIE/184 measuring 1.0 Ha as the deceased's assets. An introduction letter by the chief of Kothine Location dated 31st October 2012 listed the following as the dependants of the deceased;

1. Maria Karambu - Widow
2. Lawrence Kiambi Kiome - Son
3. Gervision Mwiti (Deceased) - Son
4. Magdaline Ngugi Mwiti - Widow of deceased Son
5. Agnes Mwendwa (Deceased) - Daughter
6. Tabitha Kathambi Mbaabu - Purchaser

2. On 3rd May 2013 **Marinda Ngugi Mwiti** applied to file an Objection out of time. The grounds of the objector were: that the objector was not consulted before the petitioner filed this cause, the applicant did not sign any consent and is not a party to the signatures which appear in the consent filed in court, the objector is entitled to a substantial interest in the estate.

3. On 30th Jan 2018 the petitioner filed summons for confirmation of grant and proposed the estate to be distributed as follows;

PARCEL NO. NKUENE/NGONYI/ 102

- a. MAGDALINE NGUGI MWITI – 1 ½ ACRES
- b. LAWRENCE KIAMBI KIOME – 1 ½ ACRES
- c. MARIA KARAMBU – BALANCE

PARCEL NO. ABOGETA/NKACHIE/184

- a. MAGDALINE NGUGI MWITI & LAWRENCE KIAMBI KIOME – TO SHARE EQUALLY

4. However, on 20th February 2018 the objector filed an affidavit of protest and stated that she is not agreeable to the mode of distribution by the petitioner. She has eight children with her late husband Geresio Mwiti Kiome. That her late husband bought 1 acre from M'Mwendwa Murithi (deceased) and gave his brother Mwobobia Kiome in exchange for his brother's share in his father's parcel of land. Therefore her

late husband was to get 2 acres from his father's estate. The objector has been utilizing 2 acres of NKUENE/NGONYI/102. The petitioner occupies one acre while her mother in law occupies ½ an acre. Additionally she proposed that ABOGETA/NGACHE/184 should be shared equally between herself and the petitioner.

ANALYSIS AND DETERMINATION

5. I have carefully perused through the applications, affidavits, submissions and the record. The issue for determination distribution of the estate properties namely, **ABOGETA/NKACHIE/184 and NKUENE/NGONYI/102.**

6. **Section 35** of the **Law of Succession Act** provides as follows;

“Where intestate has left one surviving spouse and child or children

(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:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”

7. But, the jurisprudence coming through on section 35 of the Act is that nothing in law prevents the surviving spouse from receiving a distinct share as opposed to creating a life interest over the entire estate. I see two justifications. One, my understanding of the Constitution is that the right of surviving spouse in the marriage property is a fundamental constitutional issue which should be determined before the estate is distributed. This orientation is aimed at bringing the law of succession into conformity with the Constitution as provided for in section 7 of the Sixth Schedule of the Constitution which states as follows:-

7. Existing laws

(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

Therefore, reducing a spouse's right in matrimonial property to mere life interest offends the Constitution.

8. Two, creating a life interest over the entire estate is unfair as it clogs the right of the dependants to take and enjoy their respective shares in the estate. It also postpones distribution of the estate to unknown future date.

9. Be that as it may, in this case, **Section 38** of the Act is most appropriate and the estate should be divided equally among all the dependants of the deceased. But before I close, I need to determine one issue: the alleged purchase of 1 acre by the husband of the objector who was son of the deceased and which he gave to his brother Kiome.

10. It is trite law that **‘He who alleges must prove’**. See **section 107 (1) of the Evidence Act that whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts must prove those facts exist**. In this case the objector alleged that her husband Gervision Mwiti bought one acre for his brother Kiome and in return surrendered his share of 1 acre in the estate to her late husband. First of all, such settlements of immovable property of the estate made before confirmation of grant offend the law of succession Act section 82, and are therefore unlawful, null and void. They are not protected or enforceable in law. See article 40(6) of the Constitution. In any event, the objector made mere allegations of some agreement for exchange of land ‘between Mwiti and Kiome but did not supply any evidence to support the claim. There was no any witness or documentary evidence to support the allegation. I reject the claim.

11. The deceased was survived by his spouse Maria Karambu, Lawrence Kiambi Kiome (son) and Magdaline Ngugi Mwiti, widow of late Gervision Ngugi Mwiti (Son of the deceased). Agnes Mwendwa, daughter but now deceased and no one is making any claim thereto. Therefore, I find the three above are the dependants of the deceased who are entitled to inherit the estate.

12. Accordingly, in light of the law I have set out above, the estate shall be shared equally amongst the beneficiaries as follows:-

1. ABOGETA/NKACHIE/184 –

Shall be shared equally among Maria Karambu, Lawrence Kiambi Kiome and Madarina Ngugi Mwiti

2. NKUENE/ NGONYI/ 102 –

Shall be shared equally among Maria Karambu, Lawrence Kiambi Kiome and Madarina Ngugi Mwiti

13. The grant is accordingly confirmed. This being a succession case I order each party to bear own costs.

Dated, signed and delivered in open court at Meru this 28th day of January, 2019

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F. GIKONYO

JUDGE

In presence of:-

Ann for Ogoti for protestor

M/s Wanjohi for objector

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F. GIKONYO

JUDGE