



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 370 OF 2003

IN THE MATTER OF THE ESTATE OF M'RUBAARA M'IBIRI (DECEASED)

WILSON MBURUGU RUBARA.....PETITIONER

-VS-

JULIUS MWIKUMI RUBARA.....1ST PROTESTOR

JOSEPH KIUNGA RUBARA2ND PROTESTOR

FRANCIS MBAARU RUBARA3RD PROTESTOR

PETER MBAYA RUBARA.....4TH PROTESTOR

PURITY GACHERI.....5TH PROTESTOR

MARITHA MATUU MUCHENA.....6TH PROTESTOR

PIUS MUTWIRI RUBARA.....7TH PROTESTOR

SUSAN KANARIO KABIIRI.....8TH PROTESTOR

ESTHER GACHERU KINO.....9^H PROTESTOR

EVANGELINE K GITONGA.....10TH PROTESTOR

JUDGMENT

[1] The deceased herein *M'Rubaara M'Ibiri* died on 25th July 2000 domiciled in Karieni Location. According to the letter of the Chief Karieni Location dated 3rd December 2013 he left behind the following dependants; *Wilson Mburugu Kubara, Jackson Kibunja Kubara, Julius Mwikumi Kubara, Joseph Kiunga, Francis Mbabu Kubara, Peter Mbaya Kubara, Karoki Muriuki*

[2] The petitioner herein filed for letters of Administration on 5th December 2003 listing the beneficiaries as per the letter of the Chief. It also listed the estate of the deceased as hereunder *Abothuguchi/ Kariene/412, Abothuguchi/ Kariene/1742, Abothuguchi/ Kariene/1042*. It was later to be revealed in the proceedings (during the applications for Summons for Confirmation of grant) that the deceased also left behind; *Green Courie Farm- 10 shares, Coop Bank Shares- 53 Shares, Kairima Self Help Group, Kariene Traders Self Help Group, Meru Central Farmers Co-op Union-31 shares*.

[3] The petition was gazzeted on 24th December 2003 and letters of Administration issued to the petitioners on 19th February 2004. The petitioner filed summons for confirmation of Grant on 3rd September 2004.

[4] On 11th January 2008 the 1st to 6th protestors filed a joint protest claiming that the distribution of the shares was not in accordance with the wishes of the deceased since they had already been gifted to the protestors herein specifically Green Courie farm to Agnes Karoki and the 1st to 5th Protestor and Meru Farmers Co-operative Union to Joseph Kiunga. They also alleged that half of the Share in Aabithuguchi/ Kariene/ 1042 belonged to Muchena Kabiri and is part of the Succession Cause No. 227 of 1994 In the Matter of the estate of Muchena Kabirii (deceased). They averred that Abothuguchi/Kariene/1742 was held jointly with M'Miriti M'Matune and the petitioner has not distributed the same to the intended beneficiaries i.e. Purity Gaceri& Peter Mbaya. Lastly they alleged that the petitioner had not equated the

Full acreage of Abothuguchi/Kariene/412 and that he had sought to sell the said property to a 3rd Party i.e. Paul Kaburu.

[5] Pius Rutwiri Rubara also filed an Affidavit of protest on 19th August 2010 claiming that she had been bequeathed 0.05 acres in Abothuguchi/ Kariene/412 and that John Kiogora Kithinji had also been bequeathed 0.05 Acres in the same premises and that there is a considerable fear that the Petitioner intends to sell it to Paul Kaburu Nteere.

[6] The petitioner obliged and filed a fresh Summons for confirmation of Grant on 8th June 2010 distributing the estate almost in line with the proposals by the protestors.

[7] The new distribution was however met with protest by the 8th, 9th & 10th Protestor vide Affidavit of Protest filed on 13th August claiming that Abothuguchi/Ruiga/1042 ought to be divided to themselves. They claimed to be step sisters to M'Rubara M'Ibiri (deceased herein) & Muchera Kabirii (deceased in Succession Cause No. 227 of 1994). That Abothuguchi/ Ruiga/1042, Abothuguchi/Kariene/580 & Abothuguchi/Kariene/412 belonged to their father Kabirii Murithi. They thereafter claimed that their step-brothers sub-divided the parcels in Abothuguchi/Kariene/580 & Abothuguchi/Kariene/412 according to their father's wishes but caused Abothuguchi/Ruiga/1042 to be shared in their names. That the petitioner has been aware of this hence their inclusion in the first summons for confirmation of Grant dated 28th August 2007. They therefore dismissed the Summons for Confirmation of grant dated 8th June 2010.

[8] They also filed an Application dated 21st October 2014 praying for inhibitory Orders on Abothuguchi/ Ruiga/1042.

[9] The 6th Protestor, Martha Matuu Muchena filed a replying affidavit to the 8th-10th protestor on 2nd February 2015 claiming that Muchena Kabirii & M'Rubara M'Ibiri after filing Succession cause in respect of their father Kabirii Murithi and were registered as joint owners on 8th May 1980. That the 8th to 10th Protestor allowed their brothers to take over the parcels of land. That Muchena Kabirii got on his own land parcel Abothuguchi/Kariene/580.

[10] On 31st May 2017 and by the consent of the parties the Court appointed **Francis Mbaabu Rubara, Julius Mwikumi & the petitioner** herein as the joint Administrators of the estate.

[11] It is also worth noting that the 8th protestor filed an Originating Summons on 24th August 2016 in Meru ELC No. 141 of 2016 praying for temporary injunction against the respondents, Wilson Rubara & Martha Matuu Muchena from dealing and/or in any other way interfering with L.R. No. Abothuguchi/ Ruiga/1042. I have also looked at the proceedings in **Succession Cause No. 227 of 1994 In the matter of the estate of Muchena Kabiri alias Muchena Kabiiri**

[12] The 1st to 6th protestors herein filed their witness statements on 14th February 2018 restating their position and proposing their mode of distribution. They also filed a joint written submission. The petitioner also filed a Supplementary Affidavit on 30th October 2018.

Analysis and Determination

[13] To begin with, in these proceedings have enjoined some properties that are not part of this estate. For instance, parcel No. Abothuguchi/ Kariene/580.

[14] Now I can delve into the merits of otherwise of protests herein. I wish to determine the protest by the 8th to 10th protestors first. They all aver that they are step-sisters to the deceased herein and Muchene Kabirii, the deceased in Succession cause No. 227/1994. As outlined in the affidavits the parcel No. Abothuguchi/ Ruiga/1042 was distributed to the deceased herein and Muchene Kabirii in the year 1980 and after the filing of the Succession cause on their father's estate. This averment speaks volumes as it rings customary law was applied at the time.

[15] According to Kimeru Customary Law daughters were not entitled to a share of the estate of the deceased. See **Restatement of African Law, The Law of Succession, Eugene Conran, Sweet & Maxwell 1969 pg. 30**. Whereas this custom is discriminatory to daughters, the question to ask about the 6th to 10th protestors is whether these proceedings is the correct forum to launch their claim. From the onset, the protestors' claim is on a property distributed in the Succession Cause in relation to the estate of their father. They never sought to be included in the Succession Cause 227 of 1994 against their step brothers. It is over 30 years down the line and the protestors have not stated why they did not act or why they seek to seek remedy in these proceedings. I find nothing that paints any vivid impression or picture in the mind of the court, that their claims should be entertained here. I also do not find any evidence of the current status of the property and the occupation thereof. Accordingly, this court is not able to entertain their claims herein. In any case, I fear their indolence only helps to distort their claim and the court is lost on the real purport of lodging their claims here. Their protest has only succeeded in creating a feeling of gauntness and dreariness in the court. Their averments that they were not aware of the earlier succession cause do not change the fact that the other cause is the right forum to lodge their claims. I reject their protests.

[16] As regards the protest by the 7th protestor: he made mere statement that they, with John Kiogora Kithinji, were bequeathed 0.05 Acres each by the deceased in Abothuguchi/ Kariene/412 without providing any proof thereto. The law requires that Gifts *inter vivos* ought to be proved by showing that the deceased actually transferred his property and the transfer was complete. And if the gift is incomplete, then such subsequent actions by the deceased, say, putting the person into possession and encouraging him to erect a house which he does etc must be proved if the court is to enforce such gift. The protestor herein has not shown anything of that genre and has only relied on his bare statement. This in itself cannot justify their claim in the properties. The protest falls by the way side.

[17] The position of the 6th Protestor has been supported by the 1st to the 5th Protestor. Further support came from the proceedings in the Succession Cause No. 227 of 1994. The Copy of Search record also shows the property in Abothuguchi/Ruiga/1042 belonged to M'Rubara M' Ibiri & Muchena Kabiri in equal shares and the title was issued on 8th May 1980. The Confirmation of grant issued on 15th February

2010 in Succession Cause No. 227 of 1994 In the Matter of the estate of Muchena Kabiri only distribute one half portion in Abothuguchi/Ruiga/1042 to the deceased herein. The 6th protestor therefore has a justifiable claim and only ½ share of the land is estate property herein. This cause is different from Succession Cause No. 227 of 1994 and distribution therein is not amenable to interference through this cause. The cause identified the share of the deceased and is only that share that is subject of distribution herein.

[18] This therefore leaves the court with the petitioner and the 1st to the 5th protestor. It is not in dispute that they are all beneficiaries of the estate of the deceased. I should therefore distribute the estate in accordance with the law. The petitioner and the objector have all presented their respective modes of distribution which I have considered. The deceased herein died intestate and as no surviving spouse but children, Section 38 of the Law of Succession Act applies. The section Provides;

38 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 be equally divided among the surviving children

[19] Despite the averments made by the petitioner seeking to protect the position of the 8th to 10th protestor, the proposal by both have an element of equal distribution of the estate save for the unequal distribution with regard to Agnes Karoki Muriuki. They have discriminated against her- something the court cannot countenance. See **Rono Vs Rono & Another [2008] 1 Klr (G&F) 803**.

[20] Having this position in mind, I order that the estate herein shall be distributed as hereunder;

Abothuguchi/Ruiga/1042 ½ a share to be divided equally amongst;

- 1. Wilson Mburugu**
- 2. Purity Gacheri (to hold in trust for Kenneth Gitobu, Aida Nkirote& Nora Kanana)**
- 3. Julius Mwikumi Rubara**
- 4. Joseph Kiunga**
- 5. Francis Mbaabu Rubara**
- 6. Peter Mbaya Rubara**

Abothuguchi/Ruiga/1042 ½ share;

To be divided as per grant issued in Succession Cause No. 227 of 1994 In the matter of the estate of Muchena Kabiri alias Muchena Kabiiri **Abothuguchi/Kariene/1742 ½ a share to be divided equally between;**

- 1. Peter Mbaya Rubara; and**
- 2. Purity Gacheri (to hold in trust for Kenneth Gitobu, Aida Nkirote& Nora Kanana)**

Abothuguchi/Kariene/412

Portion A

- 1. Wilson Mburugu**
- 2. Purity Gacheri (to hold in trust for Kenneth Gitobu, Aida Nkirote & Nora Kanana)**
- 3. Julius Mwikumi Rubara**
- 4. Joseph Kiunga**
- 5. Francis Mbaabu Rubara**
- 6. Peter Mbaya Rubara**

Portion B

- 1. Wilson Mburugu**
- 2. Purity Gacheri (to hold in trust for Kenneth Gitobu, Aida Nkirote& Nora Kanana)**
- 3. Julius Mwikumi Rubara**

4. Joseph Kiunga

5. Francis Mbaabu Rubara

6. Agnes Karoki Muriuki

Shares in Green Courie Farm

Agnes Karoki Muriuki- Whole

Coop Bank Shares

Agnes Karoki Muriuki- Whole

Kairima Self Help Group

Julius Mwikumi & Peter Mbaya Rubara equally

Kariene Self Help Group Joseph Kiunga & Francis Mbaabu Rubara equally

Meru Central Farmers Cooperative shares equally amongst;

1. Wilson Mburugu

2. Purity Gacheri(to hold in trust for Kenneth Gitobu, Aida Nkirote& Nora Kanana)

3. Francis Mbaabu Rubara

[21] The grant is confirmed in the foregoing terms. No orders as to costs.

Dated, signed and delivered in open court at Meru this 24th day of January, 2019

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F. GIKONYO

JUDGE

In presence of:-

Munene for petitioner

M/s Kithaka for protestor

Ngugi for Mburugu for applicant

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F. GIKONYO

JUDGE