



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE 220 OF 2008

IN THE MATTER OF ESTATE OF M'MARETE M'IKIARA- DECEASED

FRANCIS M'ITONGA.....PETITIONER

VS

ELIUD MUTWIRI

CYPRIAN KINOTI

WILLIAM KITHINJI.....PROTESTORS

JUDGMENT

The deceased M'Marete M'Ikiara died intestate on 17th October 1996 at Nkubu Hospital leaving behind the following children namely:-

1. Francis Gitonga
2. Cyprian Kinoti
3. Mary Chaku
4. Nereah Igoki
5. William Githinji
6. Eliud Mutwiri

Form P&A 5 lists estate forming part of the estate as follows:-

1. LR Nkuene/Ngonyi/L.Mikumbune/568
2. LR Nkuene/Ngonyi/193
3. Plot No. 1A Kaguru
4. Plot No. 32 ANkubu Market
5. LR No. Tunya/93

Grant of Letters of Administration was made to Francis M'Itonga on 21st October 2008 and when he filed application for confirmation dated 3rd March 2009 distributing the estate. Eliud Muturi filed affidavit sworn on 23.6.2009 protesting proposed distribution saying his father had left oral will instructing a committee of elders to oversee distribution of his estate. He said the document filed by the petitioner which he was made to sign are different from the one he endorsed to be used in court.

He said that there are names of strangers listed as beneficiaries to the deceased estate and they are not related to the deceased. Eliud Muturi confirmed that LR Nkuene/L. Mikumbune/568 was sub-divided into plots and each of the sons of the deceased were allocated portions with well marked boundaries and everyone of the 4 sons had developed their portions. He said that the plot that remained for the deceased he was

asked to combine it with his and put a hotel. He said he said that he developed the hotel during the lifetime of his father and none of his brothers objected. He said the reason he was entrusted with the remaining portion is because he cared for the deceased during his last days of his active life and even buried her on his land. He said he was left with instruction to care for his sisters incase of problems such as divorce. He said the deceased left all his vital documents in his custody. He said LR South Tharaka/Tunai A 95 should be subdivided into equal portions for the 4 sons. He said LR Nkuene/Ngonyi/193 is to be shared equally between William Kithinji and Nerea Igoki who were farming on the land.

The Petitioners wife also filed affidavit in protest to mode of distribution confirming that Eliud Muturi received a bigger share from LR 568. She said she was a friend the petitioner intended to sell his portion on LR 568 and render her 8 children destitute.

The petitioner had minutes dated 8th September 1999 where clan elders allegedly met with the sons of the deceased and agreed that portion of Nkuene 568 that belonged to the deceased should be sub divided and shared among the sons of the deceased.

The protester on the other hand had minutes of meeting allegedly held on 23rd June 2009 agreeing that the protester should have the deceased person's portion in LR 568 combined with his portion because he took care of the deceased. On 21.5.2018 and 16.7.2018 it was agreed that the only property in contention was LR Nkuene 568. The protester in cross examination confirmed the 5th portion LR 568 which remained for the deceased was the biggest and touched the tarmac along Meru-Nairobi highway. He said titles had not been issued to the deceased persons sons. He said that he was given the fathers portion as he was taking care of him and he even put up a house for him in his home. He said he received a letter dated 27th August 1997 from Miriti and Co Advocates written on behalf of his 3 brothers asking him to stop intermeddling with estate property. He said he was building a hotel and it is his father who helped him look for a licence. He said he started construction in 1994. He said the shops – 8 rooms are in the centre of the combined patrons. He said he has custody of the title that is in his father's name. he said his father didn't wish that each sons land reaches the tarmac. He said he had 2 sisters and one is deceased but is survived by children. He said the 2 sisters had their portion is set aside and they use it to farm. He said the sisters portion is inside his land combined with his fathers land.

The protesters witness Gideon M'Arimi 84 years old said the deceased summoned him among other elders and told them how he wished to distribute his land to his sons and that he gave protester a bigger portion of LR Nkuene/Lower Mikumbune/568. He could not however remember date which meeting took place. He said the deceased eldest son Francis the petitioner was present at the meeting but Cypriano was not present. He said the deceased persons daughters were given ¼ an acre to share whereas the 4 sons were each given ¼ an acre from LR 568. He said he didn't know why the deceased left his portion fronting the tarmac whereas none of his sons had their portions touching the tarmac.

He said subdivision of the portions and transfer had not been done by the time the deceased died. He said deceased persons portion had coffee trees which the beneficiaries continued to pick even after his death and delivered at Kaguru factory in the deceased persons account. He said it is Mutwiri who uprooted the coffee. He said the entire land had coffee and each beneficiary uprooted coffee from their portions. He said he was not aware a letter was written to the protester by an advocate when he started uprooting the coffee. He said he could not remember the year when the protester built the hotel.

He said Mary the deceased persons daughter died and her children use her portion of the ¼ acre that was given to her and the sister. Nereah Igoki the daughter to the deceased confirmed that deceased shared out LR 568 to his sons and remained with one portion which we said he would give to the protester to occupy together with the deceased persons daughters. She said she was not present when the deceased shared his land but he briefed her.

He said protester land has frontage to the tarmac and it was combined with that portion for the deceased and he built a hotel. She said protester took care of the deceased and that is why he was given more land. She said portions given to her brothers were clearly demarcated using K-apple fence. She said in cross examination she could not remember the date when the deceased briefed her about sharing land but she was with her sister Mary-deceased.

She said all the 4 portions given to her brothers touched the murrum road that goes to Deputy County Commissioners office n Nkubu. She said it was the deceased portion that had its frontage to the tarmac. She said their portion was in Muthuri's portion. She said the deceased said Mutwiri should take care of them and that Mutwiri had shown her a portion equal to those of her brothers. She said that she is to share ¼ acre with Mary. She said that Mary's children are using her portion. She said the deceased was living in Cypriano Kinoti's home when Kinoti was alive.

She said the mother also lived with Kinoti and that is where she died. She said Protester took the deceased when he was very sick from Cypriano home. She said that Cypriano wife used to cook for the deceased.

She said Mutwiri stayed in Nairobi but could come and take the deceased to hospital. The petitioner, Francis M'Itonga said it was not true that the deceased gave his portion of land to the protester. He said the deceased persons portion had coffee trees and bananas and the protester started cutting the coffee, bananas and trees. He said they had harvested coffee for 2 years after the deceased died when the protester started destruction of crops and trees. That the brothers warned him but he didn't heed and they instructed an advocate to write him a letter. That he started constructing temporary structures and again a notice was issued to him to stop.

He se said the structures are made of timber. He said the protester was not using the deceased persons portion during his lifetime. The petitioner said when the deceased went to Nkubu Hospital the last time he told them to take care of his coffee.

He said it is when his brother Cypriano went to stay in another land that the deceased started staying with the deceased and it was only for a period of one year before the deceased died. He said LR 568 should be distributed equally to all the children of the deceased.

He said that all sons of the deceased fenced their portions. He said Nerea and Mary were not given any share of LR 568. He admitted that

Mutwiris portion fronted the tarmac similar to the portion for the deceased. He said the protester witness is his age mate and not the deceased persons friend. He said the witness has been influenced with money to support protesters claim.

He said the protester started constructing hotel after the deceased died and they instructed their lawyer to write and stop him. He said the protester had put up structures on his portion of land during the deceased person's life time.

He said that claim by beneficiaries is over the deceased persons portions and his mode of distribution is shown in sketch plan. He said Mary and Nerea should get 20X80 feet out their fathers portion and the sons to share balance equally.

Petitioners said his proposal is as per affidavit sworn on 3rd March 2009 excluding purchasers. He said Muthuri sought authority to construct a hotel in his portion of LR 568 in 1994 and not on the deceased persons portion. William Kithinji the other so to the deceased and a brother to the deceased and brother to petitioner and protester also testified supporting the petitioner evidence and mode of distribution.

Upon close of petitioner's case parties filed written submissions. The issues for determination is whether the deceased left a will oral or written sharing his estate to the beneficiaries herein. It is not in dispute that the deceased identified portions of LR Nkuene/L.Mikumbune/568 and gave to his 4 sons and he remained with one portion. The measurements of the portions were not ascertained because a surveyor was never involved in the sub division but there is evidence both parties that the portions were clearly demarcated and fenced.

From evidence adduced by the protester and his witnesses and evidence of petitioner and his brother William, it is apparent that the deceased died intestate. The one witness availed to support evidence of protester that the deceased persons wish was that the portion the deceased left for himself be consolidated with that of the protester could not remember when the oral will was made by the deceased. Whereas the protester said he started constructing his hotel on the deceased portion while he was still alive his witness Mzee Gideon M'Arimi whom the petitioner said was actually his age mate and not an elder and deceased fired said that even after deceased died his children continued picking coffee on his portion of land. This supports evidence of petitioner that they picked coffee for 2 years subsequent to deceased death and it is then that protester started destroying coffee, bananas and trees on that portion. The petitioner and his witness said they instructed an advocate to write a letter to restrain the protester to stop intermeddling with the estate but he didn't heed. This court finds that being that the 4 sons of the deceased know the portions identified to them physically, they should each pay a survey to survey and establish measurement for purposes of registration into their names. The petitioner and protester together with all the beneficiaries to pay cost of surveying the portion that belonged to the deceased to establish its measurement and for purposes of equal distribution to the deceased persons six children or their survivors.

The deceased persons daughter Nerea Igoki confirmed that the deceased stayed with his brother Cypriano when he was still alive and that protester took him and put up a house at his home after Cypriano moved to a different location. The ground that the protester took care of the deceased in his later days can't be a good reason for grabbing a lion's share of an estate in disregard to other beneficiaries who have equal rights to the estate. If the protester took care of his aged father it was a moral obligation that does not accrue legal rights.

Concerning the other assets in the estate consent dated 10th April 2018 was filed on 24th October 2018. The same does not however provide for one of the deceased daughters survivors. This court will vary the consent to show that Nerea Igoki and Survivors of Mary Chako will benefit from the shares that were held by the deceased in clause (e) of the consent and that Nerea Igoki shall also be included in plot No. 3A Nkubu Market and Mary's survivors to benefit from plot No 1A Kaguru market. It was not explained why they were left out. The costs of the cause to be borne by all the beneficiaries.

HON. A. ONG'INJO

JUDGE

23.1.2019

Before Justice A.Ong'injo J

C/A: Kinoti

Mr Ngugi Advocate holding brief for Murango Mwenda for Petitioner.

Murango Mwenda for Petitioner

M/s Kiautha Arithi & co Advocate for protester – N/A

Petitioner – Francis Itonga – Present in person

1st Protestor – Eliud Mutwiri – Present in person

2nd Protestor - Nerea Igoki – Present in court

3rd Protestor – Mary Chaku – deceased – Husband –present in person

COURT

JUDGEMENT DELIVERED DATED AND SIGNED IN COURT ON 23RD DAY OF JANUARY 2019

Mr. Thangacia Advocate for Plaintiff – Present

Defendants: Mr. Rimiti Advocate for Defendants – Present.

COURT

JUDGEMENT DELIVERED DATED AND SIGNED IN COURT ON 23RD DAY OF JANUARY 2019

Mr. Thangacia

I pray for certified copy of judgment

Order

Certified copy of judgment to be supplied to parties upon payment of copying charges.

HON. A. ONG'INJO

JUDGE