



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 235 of 2001

In The Matter Of The Estate Of Samson Murithi M'mugambi- Deceased

JOHN KINOTI MURIUKI.....PETITIONER

VERSUS

M'MBIJIWE M' MURITHI.....OBJECTOR

JUDGMENT

1. The Deceased herein **Samson Murithi M'mugambi** died on 25th November 1999. As per the letter of the Kibaranyaki Location dated 17th September 2001 the deceased left behind the following dependants; **Zipporah Ncooro M' Murithi (wife), John Kinoti Muriuki, Franklin Gitonga, James Muriungi, Muthamia Simon Kiratia.**

2. The petitioners herein filed for Letters of Administration on 18th September 2001 and listed the dependants/beneficiaries of the deceased as per the letter of the Chief and the following as properties of the deceased;

- a. **Abothuguchi/Githongo/2077,**
- b. **Abothuguchi/Githongo/2078, **
- c. **Abothuguchi/Githongo/2079,**
- d. **Abothuguchi/Githongo/2080, &**
- e. **Abothuguchi/Githongo/2081,**

3. The letters for Administration of the Estate was gazetted on 26th October 2001. The objector herein filed objection proceedings on 20th December 2001 claiming that he is a son of the deceased and that the petition has been brought secretly by a son who is not in priority in filing the petition. The objector also stated that the petitioner also omitted from inheritance the Daughters of the deceased namely **Nkirote Murithi, Kareitha Murithi, Muthamia M' Murithi, Mwaromo Simon, Loise Karegi and Nkuene Murithi.**

4. Due to the irregularities and concealment of the material facts by the petitioner this Honourable Court by an Order dated 31st March 2003 appointed Muthamia Simon Kiratia (1st Administrator) & M' Mbiijiwe M' Mureithi (2nd Administrator) as joint administrators.

5. Therefore, the main issue that remained for determination is distribution of the estate of the deceased.

Proposal on distribution by 1st Administrator

6. The 1st Administrator filed his proposal on the mode of distribution on 6th October 2006. He averred that the deceased had left a will in relation to monies in his bank Account No. 5120006 Barclay Bank- Meru which he bequeathed to his son Franklin Gitonga who was to get $\frac{3}{4}$ of the proceeds thereof and Kinoti Muriuki a son of the 2nd Administrator $\frac{1}{4}$ of the proceeds. He also averred that the deceased had subdivided his land and had proposed to distribute it as follows; Abothuguthi/ Githongo/2078 to John Kinoti Muriuki, Abothuguthi/ Githongo/2079 to John Kinoti Muriuki, Abothuguthi/ Githongo/2077 to Franklin Gitonga, Abothuguthi/ Githongo/2080 to James Muriungi, Abothuguthi/ Githongo/2081 to Muthamia Samson Kiratia as trustee for Eric Muriuki & that all cows were given to Judith Mutimbi (wife to 1st Administrator) as gift Inter vivos

Proposal on distribution by 2nd administrator

7. The 2nd Administrator vide affidavit filed on 26th March 2008 proposed that the monies is Account No. [xxxx] Barclays Bank Meru should be distributed equally to the sons and daughters of the deceased. and the land (8 Acres in total) should be distributed as follows; Franklin Gitonga, son of 1st Administrator, 2 acres with tea bushes, John Gitonga, son of 2nd Administrator 2 Acres, 1 Acre where the deceased house stands to go to the 6 daughters, m' Murithi M'Mbijiwe, himself, 2 acres, 1st Administrator 2 acres, One cow and the calf to the 1st administrator and one cow and its calf to the 2nd Administrator.

8. The 1st Administrator replied to the proposal of the 2ND administrator terming it untenable as it does not reflect the wishes of the deceased. He also claimed that the daughters are married and are not demanding anything from the estate.

9. The matter proceeded on via viva voce evidence where three (3) witnesses testified.

10. Pw1 M' Ikungu M'Ajaria's testimony was never cross- examined since he passed on prior to his cross-examination. During his Examination-in- chief he testified that he was a cousin of the deceased and that he was present when the deceased called out family members and clan elders to inform them of how he wishes to distribute his properties. That the deceased gave land to the sons of the 1st and 2nd Administrators because they took care of him. That he never gave anything to the 2nd Administrator though his intent was to give him ½ an acre which he later gave to the 1st Administrator after learning that the 2nd Administrator had sought to sell the said land.

11. Pw2 was the 1st Administrator. He testified that they are 3 sisters and 2 brothers. That the 2nd Administrator was given land in Kibiricha- 8 acres during the lifetime of the deceased whereas they remained in Githongo which is approximately 9 Acres. That the deceased had distributed his property 15yrs prior to his demise though in cross-examination he testified that the deceased distributed the property in 1999. He averred that he stayed with the son of the 2nd Administrator, John Kinoti at the land in Githongo. He also admitted that he has two acres in the land in Githongo. He restated his position with regard to the mode of distribution as he had submitted in his Affidavit filed on 6th October 2006. In support of his mode of distribution he tendered the LCB consent marked as Exh 1a-f.

12. In cross examination he averred that the area chief was present during the meeting with the clan elders and the family. He testified that he has no bad blood with his stepbrother, the 2ND Administrator though he could not recount the number of children he has. He reaffirmed that the grandsons took care of the deceased and that he saw the letter issued to the Bank after his father asked him to give him pictures of the grandsons. That the daughters were not given anything. He however acknowledged that he had two step sisters.

13. PW3 Jane Waithera wa Muitiu testified that she is the Branch Manager Barclays Bank Meru Branch and that the deceased was their customer and bearer of Account No. [xxxx], She averred that prior to his death he deposited to the bank an enveloped which he produced as Exh 2a& will produced as Exh 2b. She also produced the bank statement of the deceased account indicating that the deceased had an Outstanding balance of Kshs. 1,795,237/= and the covering letter as exh 3a and 3b. The bank also wrote a letter dated 13th July 2016 renouncing its appointment as executor.

14. Parties were directed to file submissions but only the Objector/2nd Administrator who filed submissions disputing the will alluded to by the 1st Administrator, the validity if the LCB consent and the mode of distribution.

15. I note that instead of filing written submission one, Agnes Nkirote M'Murithi filed an affidavit in protest of confirmation of grant dated 28th October 2018 claiming that she is a daughter of the deceased and that the deceased had 6 daughters. That the deceased had given her land to cultivate but she was chased away by the 1st Administrator. That she had visited his father at Chogoria Hospital at the time of his death but at no time had the deceased disclosed that he had left behind a will. That the deceased never subdivided the land nor attended to the L.C.B. Board. She also averred that the deceased had informed her that the monies in the bank ought to be distributed equally amongst the children and grandchildren should get from their parents.

Analysis and Determination

16. I have carefully considered the evidence on record and the submissions by the objector/2nd Administrator. I have equally but cautiously considered the evidence of M'Ikungu Aijara & affidavit of Agnes Nkirote M' Murithi as the former was not cross- examined and the latter was filed after close of pleadings and without the leave of Court.

Issues

17. The first issue for determination is the validity of the will. The will is alleged to have been made by the deceased on 12th July 1991 and in the presence of an advocate i.e. Ashford. G. Riungu. The will was only attested to by the deceased and witnessed by the advocate- Ashford G. Riungu who also happens to be the petitioners advocate.

18. The envelope which delivered the will to the deceased's Bank also contained photos of the grandsons of the deceased and certification of the seal and thumbprint. However no stamp is affixed to confirm the date which it was delivered. No evidence was led to determine the date of its delivery.

19. The will proposed to bequeath ¾ of the proceeds to Franklin Gitonga and ¼ thereof to Kinoti Muriuki and also appointed Barclays Bank Ltd as the executor of the will. The bank has since renounced its right as executor of the will by a letter addressed to this Court dated 13th July 2016.

20. Does the will meet the threshold of the law? Section 11 of the Law of Succession Act provides on the validity of written wills as follows;

11. No written will shall be valid unless -

(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary (emphasis mine).

21. On the face of it the will cannot be said to be valid. It has not been witnessed by two independent witnesses as required in law. It was also not signed in the manner provided in law. Again, the validity of the deceased thumbprint may be in doubt as it has not been certified. The certification attached to the envelope is not sufficient. Notably, the advocate who witnessed the will is the advocate for the petitioner and also doubled up as the drafter of and witness to the will. Yet, he did not produce evidence on exactly how the will was made and such other fine details as he actually read the provisions of the will to the deceased in a language that he understands before the deceased signed the will. I find the will does not meet the legal threshold and therefore it is not valid. The will has not been proved.

22. The application for LCB consents only has a signature purportedly to be that of the deceased- but the signature is even different from the thumbprint affixed to the will. The document only bears some signature and nothing sanctifies or certifies the applications to have been made and signed by the deceased. In any event, the applications were purportedly signed by one party and were not presented to the board. As such, the applications have no legal force or any probative values especially in the absence of the foundational prerequisites thereto. The averment therefore that the deceased distributed his land in Githongo during his lifetime was not proven on a balance of probabilities. Again one of the applications for LCB consents is drafted in favour of a minor which is also suspect.

Of daughters

23. The daughters of the deceased have been side-lined in the distribution of the estate. The law of the succession Act provides for equal distribution of the estate when the deceased dies intestate as is in this case. The distribution of the estate should therefore not favour a particular gender and exclude the other as this will be tantamount to discrimination and an upfront to Article 27 of the Constitution that protects persons from discrimination on the basis of gender and/or sex or status.

24. Bizarre as it may sound the petitioner and 1st Administrator seems to justify exclusion of the daughters of the deceased from inheritance because they are women. They are seeking exclusive interest in the estate of the deceased. This Court will not tire to banish the ugly patriarchal garment of discrimination against women whenever it stalks the path of justice. There can never be justice until all forms of discrimination including against women are eliminated.

25. The deceased died intestate. From the evidence, the 2nd Administrator got his share of the estate, being land in Kibiricha measuring 8 acres during the lifetime of the deceased. I will take that bequest into consideration.

26. The distribution of the estate of the deceased is governed by Section 40 of the Law of Succession Act which provides;

40. (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

27. I should also consider the claim by the grandsons. Grandsons do not supersede the children of the deceased. The only two instances when grandsons take a share directly from the estate of the deceased are; (1) when they bring themselves under Section 29(b) of the Law of Succession Act; or (2) when they are taking the share of their deceased parent- a beneficiary of the estate. See **Cleopa Amutala Namayi v Judith Were [2015] eKLR**. What is the position in this case?

28. The grandsons are said to have been taking care of their grandfather prior to his death and have in turn become dependants of his estate. Joshua Kinoti even built in the estate. They shall therefore have a share in the estate of the deceased.

29. There is uncertainty as to where each of the parties herein reside. That notwithstanding, I order the estate to be distribute as follows;

(i) Abothuguchi/Githongo/2077, Abothuguchi/Githongo/2079, Abothuguchi/Githongo/2081 to be distributed equally amongst Nkirote Murithi, Kareitha Murithi, Muthamia M' Murithi, Mwaromo Simon, Loise Karegi and Nkuene Murithi.

(ii) Abothuguchi/Githongo/2078 to be distributed equally amongst John Kinoti & Franklin Gitonga

(iii) Monies in Barclays Bank of Kenya Meru Branch to be Distributed equally amongst Nkirote Murithi, Kareitha Murithi,

Muthamia M' Murithi, Mwaromo Simon, Loise Karegi, Nkuene Murithi and Samson Muthamia

(iv) Cow and Calves to Samson Muthamia

30. Lastly in Order to safeguard the interest of the daughters herein I hereby appoint Agnes Nkirote M' Murithi to be one of the Administrators. The grant herein is confirmed in the foregoing terms.

Dated, signed and delivered in open court this 23rd day of January, 2019

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F. GIKONYO

JUDGE

In presence of

Wamache for Riungu for petitioner

Mrs. Kaume for Objector – absent.

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F. GIKONYO

JUDGE