



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 570 OF 2010

In The Matter Of The Estate Of Joseph M'ithili M'thirua (Deceased)

GERALD GITONGA.....PETITIONER

VS

ANASTACIA KANANU.....PROTESTOR

JUDGMENT

[1] **JOSEPH M'ITHILI** (“the deceased) to whom this Succession Cause relates died on 16th October 2009. The chief in his letter of introduction dated 4th March 2010 stated that the deceased was survived by:

- 1. Maria Kirito M'ithili - 1st Wife**
- 2. Andrew Nkunja - Son**
- 3. Gerald Gitonga Ithili - Son**
- 4. Paul Muthomi Ithili - Son**
- 5. Peter Kiunga Ithili - Son**
- 6. Anastacia Kananu - 2nd Wife**
- 7. Margaret Kendi - Daughter**
- 8. James Kimathi Ithili - Son**
- 9. Daniel Kailemia Ithili - Son**
- 10. Martha Kinya Ithili - Daughter**

And listed the assets as **Plot No. 174 Isiolo Town, Land Parcel No. Akithi/Athwana – Akithi 891 and 326**

[2] The petitioner petitioned for letters of administration and also issued a citation for the appearance of the objector and her family. On 4th July 2011 the petitioner was issued with the grant of letters of administration intestate. He applied for confirmation of the grant through his application dated 9th May 2013. Thereafter, a protest was filed by Anastasia Kananu, James Kimathi Ithili, Daniel Kailemia Ithili and Martha Kinya Ithili vide their affidavit dated 14th June 2013. They deposed that none of the two families ever sat down and agreed on how the estate should be distributed. They did not even agree that the petitioner would be the one to take out the letters of administration. According to them, the deceased during his lifetime distributed the estate and some of the dependants have built permanent homes on the portions they were given.

Proposed mode of distribution

[3] The petitioner proposed that the estate be divided as follows:

1. Plot No. 174 Isiolo

To be shared equally amongst the two widows Anastacia Kananu and Maria Kiriti M'Ithili

2. Land Parcel No. Akithi/Athwana-Akithi/891 and 326

Each to be equally shared between the two houses

[4] The protestors are of a different opinion. They proposed that the estate be distributed as follows:

1. Plot No. 174 Isiolo and Land Parcel No. Akithi/Athwana-Akithi/891

Anastacia Kananu

2. Land Parcel No. Akithi/Athwana-Akithi/326

Maria Kiriti M'Ithili

ANALYSIS AND DETERMINATION

[5] The issue of determination before this court is how the estate of the deceased ought to be distributed.

[6] The deceased was polygamous and had two houses and each house had four surviving children. The assets that form part of the deceased's estate are also not in dispute. In such scenario, how should the estate be distributed?

[7] The protestor (*now deceased*) argued that the deceased distributed his estate before his demise. No evidence has been adduced to this effect. Accordingly, this court cannot rely on just mere allegations. On the other hand, the petitioner is advocating for equal distribution. The deceased being polygamous the guiding provision of the law is **Section 40 of the Law of Succession Act** which stipulates that:

“(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.”

[8] It is apparent from **Section 40 and Sections 35 to 38 of CAP 160** the objective of the law is to ensure that there is equality and equity in distribution of the estate of the deceased amongst dependants. In this case, it seems the two houses have same number of children. Consequently, I order that the estate be distributed as follows:

1. Plot No. 174 Isiolo

To be shared equally amongst the two houses; Anastacia Kananu and Maria Kiriti M'Ithili

2. Land Parcel No. Akithi/Athwana-Akithi/891

To be shared equally between the two houses

3. Land Parcel No. Akithi/Athwana – Akithi/326

To be shared equally between the two houses

The grant is confirmed. No orders as to costs.

Dated, signed and delivered in open court at Meru this 26th February, 2019

.....

F.M GIKONYO

JUDGE

In presence of

Muchiri for petitioner

M/s Mbijiwe for Mokuu for objection

.....

F.M GIKONYO

JUDGE