



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 16 OF 2017

IN THE MATTER OF THE ESTATE OF M'MURUNGI M'BWIRIA Alias M'MURUNGI MBIRIA (DECEASED)

JACOB M'KIRIINYA MUGUNA.....PETITIONER/RESPONDENT

VERSUS

JULIA MUKOMUTHAMIA M'RUKARIA.....PETITIONER

HENRY M'IKARIA.....PROTESTOR

JUDGMENT

1. **M'MURUNGI M'BWIRIA (“the deceased”)** died intestate on 21st October 1977. On 19th August, 2013, **Julia Mukomuthamia (“the petitioner”)**, filed a citation against **Henry M'Ikaria** and **Esther Karwitha** to accept or refuse letters of administration. Her brother and sister respectively on the grounds that she was a daughter of the deceased and the two who had equal priority had failed to apply for the same.

2. On 6th June 2017, the petitioner lodged this succession cause disclosing **LR NO. NTIMA/NTAKIRA/341** as the only asset forming the estate. The grant was issued to her sometimes in early 2018 and on 28th May, 2018 she applied for its confirmation proposing to distribute that property as follows: -

a) Julia Mukomuthamia M'Rukaria - 0.244 ha

b) Henry M'Ikiara - 0.4 ha

3. On 17th September 2018, **Henry M'Ikiara (“the protestor”)** filed a protest contending that he is a son to the deceased. That the deceased was survived by 7 daughters and himself. Two had passed on. That the family had agreed that he be given the entire property as that was the deceased's wishes.

4. On 27th November 2018, the petitioner filed a Further Affidavit wherein she alleged that all her married sisters were not interested in the estate land. That it was only her and the protestor who were living on the estate property.

5. The parties filed submissions which the court has considered. The issue for determination is; **how should LR NO. NTIMA/NTAKIRA/341 be distributed?**

6. The deceased died in 1977, before the enactment of the Law of Succession Act. In this regard, it is the Meru customary law which should apply in this case. According to **Eugene Contran, Restatement of African Law: 2 Kenya II Law of Succession, (Sweet & Maxwell, 1969)** at page 30, the estate of a deceased in Meru and Tharaka community was divided among the sons. The daughters and widows received no share from the estate.

7. However, the application of customary law is qualified by **section 3(2) of the Judicature Act** which provides: -

“(2) The High Court, the Court of Appeal and all Subordinate Courts shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay”.

8. Further, **In re Estate of Mwangi S/O Ngamba Alias Mwangi Ngamba (Deceased) [2015] eKLR**, the court held:-

“The coming into operation of the Constitution, 2010 radically changed the position, for the new law outlawed discrimination in all its forms. Article 10 of the Constitution, 2010, states the national values and principles. Article 10 (2)(b) includes human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, among the said values and principles. Article 27 of the Constitution, 2010, states the principle on equality before the law and the right to equal protection and equal benefit of the law. It also states that men and women have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. There is also Article 2(4) of the Constitution, 2010, which states that any law, including customary law, which is inconsistent with the Constitution, 2010, is void to the extent of the inconsistency. Thus, any customary law that discriminates against women in inheritance is consistent to the letter and spirit of our constitution and therefore null and void.”

9. In this regard, applying the Meru customary law would disinherit the petitioner because of her gender. It cannot therefore be applied in this case. In order to be in line with the Constitution, we shall apply the principle of equality.

10. On 19th September, 2018, the daughters of the deceased appeared in court. They informed the court that they never wished to get any share from the estate save for the petitioner. Consequently, the estate is to be distributed between the petitioner and the protestor only.

11. I would have been minded to distribute the estate equally were it not for the petitioner herself who insisted that she wished her brother to get a bigger share as that is how they have been occupying the property on the ground.

12. Accordingly, the estate will be distributed as follows: -

LR NO. NTIMA/NTAKIRA/341

Julia Mukomuthamia M'Rukaria - 0.244 ha

Henry M'Ikiara - 0.4 ha

13. This being a family matter, I will make no order as to costs.

DATED and DELIVERED at Meru this 21st day of February, 2019.

A. MABEYA

JUDGE