



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 394 OF 2011

IN THE MATTER OF THE ESTATE OF M'MUTHURI GITUAMBAE Alias MUTHURI GATUAMBAE

PETER MWORIA M'MUTHURI PETITIONER

VERSUS

HELLEN NKATHA M'MWITHIMBU PROTESTOR

JOSEPH MURITHI MBOGORI INTERESTED/PARTY

J U D G M E N T

1. **M'Muthuri Gituambae Alias Muthuri Gatuambae (“the deceased”)** died on 25th January, 1996. The letter of introduction from the Chief of Mulathankari Location dated 21st May, 2008 disclosed that the deceased left behind 17 children from four wives. He only left one property, **LR. Nyaki/Mulathankari/138** measuring 7.08 ha, as his estate. The letter also listed 9 other persons it called ‘beneficiaries’.
2. On 22nd July, 2011, **Peter Mworio M'Muthuri (“the petitioner”)** petitioned for grant of letters of administration intestate which was issued to him on 30th December, 2011. He then applied for its confirmation on 5th November, 2012 whereby he gave his proposal on distribution.
3. On 10th July, 2013, **Hellen Nkatha M'Mwithimbu (“the Protestor”)** protested against the proposed distribution on the grounds, *inter alia*, that the petitioner had excluded her from the proposed distribution; that the signature appearing on the consent to confirmation was not hers but was a forgery; that as daughter of the deceased she was entitled to at least 2 acres as per the wishes of the deceased and that the proposed distribution included strangers. She therefore urged that the estate be distributed equally amongst 14 children of the deceased.
4. The protest was heard by way of *viva voce* evidence. The protestor testified and did not call any witness. She reiterated the contents of her affidavit of protest, the further affidavit and further testified that; the petitioner did not inform her when he filed the cause and that she had not given consent to the proposed distribution.
5. In cross-examination, the protestor stated that she did not know if her late brother **Julius Gikundi Muthuri** had sold ½ acre to **Josphat Murithi Mbogori (“the interested party”)**. She admitted that she was the one who signed **Form 37**, the consent to distribution.
6. **RW1** was the petitioner. He told the court that he was a son of the deceased. That during his lifetime, the deceased had physically divided his land among his sons with each getting 2 acres; that the deceased indicated that none of his daughters should inherit him; that the protestor lost her husband’s property through an auction in respect of a loan advanced to one of her brothers, **Samuel Ndumba**, whom she had guaranteed. That the family had decided that she gets 0.625 acres from that brother, **Samuel Ndumba**.
7. In cross-examination, he admitted that some of his brothers had sold their portions to purchasers who had substantially developed their portions. One of his brothers, **Julius Gikunda** had sold his entire share before he died leaving no survivor. He admitted that the protestor had not signed the consent to distribution.
8. **RW2 Harriet Kanini Matumbi**, a daughter of the deceased testified that, the deceased had in 1995 stated that none of his daughters was to inherit from him. That none of the deceased’s surviving daughters wanted to have any share in the estate.
9. **RW3 Godfrey Mwenda**, a grandson of the deceased stated that the deceased gave land to **Catherine Mwengwa and Robert Kinyua** during her lifetime. He also gave a lengthy explanation on those who had purchased portions of land from the estate.
10. **RW4 Silas Mbaabu Muguna** told the court that he had purchased a portion from the share of **Julius Gikunda** before the latter’s demise. **IPW1 Josphat Murithi Mbogori** bought a half acre of land from **Julius Gikunda** on 6th March, 1998 for KShs. 120,000/- and had

extensively developed the same

11 The petitioner and the interested party filed submissions which the court has considered. The protestor filed no submissions. The issues for determination are; ***whether the deceased had divided his property during his lifetime and, if not how should the estate should be distributed.***

12. The testimony on record is that the deceased had 4 wives with a total of 17 children. The petitioner's testimony was that the deceased had divided his property in 1995 amongst his sons giving each 2 acres. That the deceased stated at the time that none of his daughters were to inherit from him. That since all his daughters were at the time married, any of the daughters who returned home, she was to go to her biological brothers and get a share from them. The protestor testified to the contrary.

13. It is clear from the record that all the daughters of the deceased had been married as at 1995. The evidence shows that the sons were given two acres each, took possession thereof and developed their own respective portions. **PW2** a daughter of the deceased testified that all the daughters of the deceased were not interested in the estate because that was the deceased's wish. **PW2** stood to gain nothing from her testimony.

14. Further, the record shows that, once the sons took possession of the properties as demarcated on the ground by the deceased, most of them disposed parts thereof to 3rd parties. That was because they were aware that the deceased had bequeathed them the same absolutely.

15. It is important to note that, ever since the deceased died in 1996, none of the daughters, including the protestor, laid claim on the estate property until 2013 after the petitioner filed his proposed mode of distribution. Between 1996 and 2013, most of the sons of the deceased sold portions of their shares to 3rd parties. There was no objection or dispute to the occupation of the estate property. Accordingly, the only irresistible conclusion is that the deceased had divided his land to his sons during his lifetime. He may have not wished that his daughters inherit from him as all of them had been married by the time he was settling his sons.

16. I saw the witnesses testify, the protestor stated that she was 70 years old living on a property purchased by her child. She did not seriously dispute that the family had agreed that she gets 0.625 acres from the share of **Samuel Ndumba** since the latter had caused her land to be sold at an auction. That portion of evidence was proved on a balance of probability, in my view.

17. There is also the issue of the purchasers who purchased portions from the sons of the deceased, took possession thereof and extensively developed the said portions. I am aware that they cannot be said to be protected under **section 93 of the Law of Succession Act** as the sale to themselves was but a clear intermeddling of the estate.

18. However, the question that begs is whether the status quo that has been obtaining now for over 21 years should be reversed? What effect will such reversal have in the social fabric of the parties? Why did the protestor not protest at the earliest when the purchasers "invaded" the property? Why didn't she question the deceased's action in 1995 or shortly thereafter?

19. In my view, apart from the fact that the deceased divided his property amongst his sons and stated that no daughter will inherit him, since all had been married at the time, to reverse what has happened in the last 21 years will but lead to chaos, which is what the law seeks to prevent.

20. Accordingly, I hold that the deceased had divided his property during his lifetime giving his sons 2 acres each.

21. As to how the estate should be distributed, the proposal by the petitioner is in terms of how the deceased had divided his land save on those portions already sold to 3rd parties. However, there was the issue of the family having agreed that **Samuel Ndumba** giving the protestor 0.625 acres. Neither **Samuel Ndumba** nor the protestor denied that fact.

22. In this regard, the estate will be distributed as suggested by the petitioner save that the portion of **Samuel Ndumba** will be distributed as follow:-

a) **Samuel Ndumba** - **0.875 acres**

b) **Hellen Nkatha M'Mwithimbu** - **0.625 acres**

23. This being a family matter, there will be no order as to costs.

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

A. MABEYA

JUDGE