



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO.672 OF 2015

(FORMERLY CHUKA SPM SUCCESSION CAUSE NO. 79 OF 2015)

IN THE MATTER OF THE ESTATE OF THE LATE MUGAMBI MUKETHA- -(DECEASED)

DAVID KARIUKI MUCHUNKU.....APPLICANT

VERSUS

LEAH MUKWANJIRU MWIANDI.....RESPONDENT

J U D G E M E N T

1. This cause relates to the estate of the late **MUGAMBI MUKETHA** who died sometime in 1960 resident at Karingani Location. The deceased died intestate and as per the petition for letters of administration filed, he left two dependants surviving him namely;

i. Janet Gaaji Muchunku (the petitioner now deceased)

ii. Nkonge Mwititi James

2. The Petitioner (Janet Gaaji Muchunku) was opposed by Leah Mukwanjiru Mwiandi (Objector) who contended that she was a sister in law to the deceased having married to the late Mwiandi who was a brother to the deceased herein. According to the Objector the deceased died intestate and had no wife or children. As the matter was pending for determination, Janet Gaaji unfortunately passed on. This court upon her demise appointed her son David Kariuki Muchunku to act in her place. In the meantime Mukwanjiru Mwiandi was appointed the administratrix on 4th October, 2018 but both parties were given liberty by this court to move the court for confirmation of grant.

3. Thereafter two separate applications were preferred by the administrator and administratrix respectively and separately. One was by David Kariuki Muchunku dated 3rd November, 2018 and the other dated 4th February, 2019 by Leah Mukwanjiru Mwiandi. This court directed that the Summons for Confirmation of Grant dated 3rd December, 2018 would be entertained while the Summons for Confirmation of Grant dated 4th February, 2019 would be treated as a protest.

4. In the Summons for Confirmation of Grant dated 3rd February, 2018, David Kariuki Muchunku, the applicant states in his Supporting Affidavit that his late mother, Janet Gaaji Muchunku was the only surviving child to the deceased. He has further deposed that his late mother left behind other children namely; Haron Mutwiri, Stella Muthoni Muchunku and Nancy Nyawira Muchunku. He has asked that the estate comprised in that property known as Mwimbi/Kiraro/261 should go wholly to him and has attached a consent from his siblings to that effect.

5. On the other hand Mukwanjiru Mwiandi in her application dated 4th February, 2019 states that she is a sister in law to the deceased. She contends that the deceased inherited her after the demise of her husband and that the deceased had intended to gift her the estate though he died before transferring the parcel to her. She has therefore proposed that the estate be solely distributed to her.

6. At the hearing of the protest, the administratrix reiterated that David Kariuki Muchunku should not benefit from any share in the estate, as according to her David Kariuki had his own father. He testified that the estate measures ½ an acre and conceded that her own husband the late Mwiandi also got ½ an acre. She insisted that Janet Gaaji's father was one Mitambo and not the deceased herein. It is the position of the administratrix that Patrick Kariuki and her late mother were strangers to the deceased and that she was the closest relative as her late husband was brother to the deceased herein and hence her sister in law.

7. On his part, David Kariuki (DW1) testified that the deceased was his grandfather by virtue of being the father to his late mother Janet Gaaji. He further testified that the deceased had two children namely; Janet Gaaji and Mbae both of who are now deceased. He conceded the fact that the administratrix was married to Mwiandi who was a brother to the deceased herein. In his view, the administratrix having benefitted from her late husband's (Mwiandi) estate had no right claiming the estate of the deceased herein.

8. The applicant's position was supported by **BUNDI KARIGICHA (DW2)** who testified that he was from the same clan with the deceased. He testified that he knew the deceased well and that he had two children namely; Janet Gaaji and Mbae. He further stated that Mbae died in young age leaving Janet Gaaji as the only dependant. His view was that the children of Janet Gaaji should be allowed to inherit the estate herein. It was his evidence that the protestor (Leah Mukwanjiru) has her own inheritance from her late husband Mwiandi. He was supported on this position by William Kagundu (DW3) who told this court that he was also a family member of the deceased herein.

9. This matter has raised two issues namely:

- i. Who are dependants to the deceased herein
- ii. How should the estate herein be distributed?

10. On the first issue, it is clear and uncontested that Leah Mukwanjiru was married to the deceased brother, named Mwiandi (deceased). It is also undisputed that David Kariuki Muchunku is a son of the late Janet Gaaji who had initially petitioned for letters of administration in this cause as the daughter of the deceased. He is claiming the estate herein on behalf of her late mother (Janet Gaaji).

11. The protestor's (Leah Mukwanjiru) claim stems from her allegation that the deceased herein inherited her after the demise of her husband (Mwiandi) who was a brother to the deceased. She however adduced no evidence in order to establish her dependance under **Section 29 (b)** of the **Law of Succession Act**. She did not call any witness to attest to her claim. The court noted that she is quite advanced in age and perhaps that could explain her difficulties in trying to explain her relationship with the deceased herein. However, what came out clearly from her account and the account of witnesses who came to testify in support of David Muchunku's claim, is the fact that Leah Mukwanjiru was a sister in law to the deceased by virtue of the fact that her husband (Mwiandi) was a brother to the deceased. She also claimed that the deceased had no children and that the deceased left the estate to her and/or held the property forming the estate in trust for her. Trust is a question of fact and nothing was placed before me to prove that the deceased held the estate in trust of Leah Mukwanjiru and/or had given the property to her as gift on account of having inherited her as a wife.

12. This court listened to Leah Mukwanjiru keenly because despite her age, she pursued this matter passionately. She clearly stated in her evidence that her own late husband (Mwiandi) had his own land and when asked what she has done to the property, she asserted that she has distributed it to her children. She conceded that the deceased herein got his share upon sharing their father's share with Mwiandi. It is therefore hard to fathom how her claim to the estate of the deceased herein can be justified.

13. On the other hand this court finds that the evidence placed before me indicates that Janet Gaaji was a daughter of the deceased herein. The protestor insisted that Janet Gaaji was a daughter of one Mitambo but no evidence was tabled to prove that fact. I have considered the evidence of the two witnesses called to testify in support of David Kariuki Muchunku and find that the evidence is corroborated by an introductory letter written by the Area Assistant Chief dated 27th July 2015 which was used by the late Janet Gaaji to petition for letters of administration in this cause.

14. Based on the evidence on record, this court finds on a balance of probability that Janet Gaaji was the only surviving dependant to the deceased.

15. On the second and the last issue for determination in this judgment is that there is no dispute that David Kariuki Muchunku applied and was granted capacity to claim on behalf of her mother's estate. He is a grandchild to the deceased though he established no dependancy to the deceased in terms of **Section 29(b)** of the **Law of Succession Act**, I also find that Leah Mukwanjiru did not establish any either. In such situations the provisions of **Section 39** of **Law of Succession Act** gives a guideline on how an estate of a deceased person (with no surviving spouse or children) should be distributed and the law gives an order of preference on who should be considered based on degree of consanguinity and affinity. The applicant and the protestor are without doubt close relatives of the deceased and must be considered as such.

16. The dispute here in my view can be determined by examining the degree of consanguine and affinity as provided under **Rule 7(1) (e) (iii)** of **Probate and Administration Rules** which provides a useful chart in the 2nd schedule to be considered. A look at the chart reveals that David Kariuki Muchunku and his siblings being grand children rank higher than in their claim than the claim by Leah Mukwanjiru whose claim is based on her late husband's affinity to the deceased which is 3rd degree as compared to the applicant's affinity which is 2nd degree.

17. The estate in this cause comprises that property known as Mwimbi/Kiraro/261 which measures approximately 0.5 acres. In view of my finding above in regard to who should benefit from the distribution of the estate by dint of **Section 39** of the **Law of Succession Act**. The grant issued on 4th October, 2018 is hereby confirmed and the estate of the deceased shall be distributed as follows:

- i. David Kariuki Muchunku - 0.4 acres. His siblings have executed a consent that the estate should go to him.
- ii. Mukwanjiru Mwiandi - 0.1 acres.

I shall make no order as to costs so each party to pay own costs.

Dated, signed and delivered at Chuka this 24th day of April, 2019.

R. K. LIMO

JUDGE

24/4/2019

Judgment signed, dated and delivered in the open court in the presence of Leah Mukwanjiru and David Kariuki Munchunku.

R.K. LIMO

JUDGE