



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 282 OF 2005

In The Matter of the Estate of Andrew M’Mugwika M’Mukira (Deceased)

DOUGLAS GICHURU MWOBOWIA M’MUGWIKI suing as the legal

Representative of the late JOHN MWOMBIA M’MUGWIKA.....DECEASED

-Versus-

FRANCIS KARANI RESPONDENT

GRACE GAKII MWITL.....1ST INTERESTED PARTY

LYDIA KAGWIRIA DANIEL.....2ND INTERESTED PARTY

JUDGMENT

[1] **ANDREW M’MUGWIKA M’MUKIRA** (“the deceased”) to whom this succession cause relates died on 13th June 1989. The petitioner petitioned for grant letters of administration where he stated that the deceased was survived by:

1. Elizabeth Muthoni Mugwika - **Wife** (deceased)
2. Ayub Meme M’Mugwika - **Son**
3. John Mwobobia M’Mugwika - **Son** (deceased)
4. Janet Nyegera - **Son**
5. James Mbaya M’Mugwika - **Son**
6. Esther Nkatha M’Mugwika - **Daughter**
7. Salome Kanyatta - **Daughter Married**
8. Musa Kinyua M’Mugwika - **Son**

His assets were listed as: **Abothuguchi/Githongo/1187** and **Mwichwiri/Kangaita/62**

[2] On 22nd March 2017 the court appointed Grace Gakii Mwitl and Lydia Kagwiria Daniel as joint administrators of the estate. It also ordered that **L.R. No. Mwichwiri/Kangaita/62** be removed from the proceedings for it is not estate property.

[3] An application for confirmation of grant dated 22nd September 2018 was filed supported by an affidavit sworn by Lydia Kagwiria sworn on 22nd September 2018. She proposed that the since her father, John Mwobobia, was in use and occupation of 3.5 Acres of **Abothuguchi/Githongo/1187** the said portion to be distributed amongst his 8 children. Then the rest of the estate to be shared equally amongst Ayub Meeme, James Mbaya, Esther Nkatha and Musa Kinyua where each will get 2.075 Acres.

[4] In their submissions, the interested parties provided another mode of distribution as opposed to what they had stated in the affidavit. They submitted that the estate be divided equally amongst Ayub Meme, James Mbaya, Esther Nkatha, Musa Kinyua and John Mwobobia.

[5] This was opposed vide the petitioner's affidavit of protest sworn on 30th October 2018. He proposed that the estate be distributed as follows:

1. Esther Nkatha M'Mugwika - 1.70 Acres
2. Ayub Meme M'Mugwika - 2.57 Acres
3. James Mbaya Mugwika - 2.57 Acres
4. John Mwobobia M'Mugwika - 2.40 Acres
5. Moses Kinyua Mugwika - 2.40 Acres

In his submissions dated 1st April 2019 the petitioner also provided a different mode of distribution. He submitted that the estate be distributed as follows:

1. Esther Nkatha M'Mugwika - 1.70 Acres
2. Ayub Meme M'Mugwika - 2.57 Acres
3. James Mbaya M'Mugwika - 2.57 Acres
4. Moses Kinyua M'Mugwika - 2.40 Acres
5. John Mwobobia M'Mugwika - 2.40 Acres

His share to be distributed amongst his widow and children apart from the Interested Parties since they are not direct beneficiaries.

ANALYSIS AND DETERMINATION

[6] The Court should determine how the estate of the deceased should be distributed.

[7] Where an intestate has left a surviving child or children but no spouse his estate ought to be distributed according to the provisions of **Section 38 of the Law of Succession Act** which states:

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

Section 29 of the said Act recognizes children as dependants of the deceased, and does not distinguish between sons from daughters, or married or unmarried or their status. I am however that customary law had the tendency of discriminating female children of a deceased; such customs are retrogressive and have been put in their place by the Constitution and the Law of Succession Act. I am delighted to cite a persuasive but spot-on decision in the case of ***In Re Estate of Solomon Ngatia Kariuki (deceased) (2008) eKLR*** Makhandia J (as he was then) that:

“The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.”

[8] The foregoing shall guide the court herein. From the mode of distribution provided by both parties is that the estate be divided amongst the deceased's five children. The deceased's daughters Janet Nyegera and Salome Kanyatta have been excluded seemingly because they are married. Moreover, there is no indication from the record that they have expressly renounced their interest. As a result, the estate of the deceased shall be divided equally amongst all his children as stipulated by **Section 38 of CAP 160**.

[9] As for John Mwobobia M'Mugwika his share will go to the administrator of his estate to be shared equally amongst all his children as there seems to be no consensus on how it should be distributed. This cause cannot seek to resolve any issue arising amongst the heirs of his estate lest the court dips these proceedings into confusion and protracted wrangles amongst beneficiaries of a deceased beneficiary. I have stated before and I will repeat it, once the share of a beneficiary is determined by a probate court, such share may be sold, charged or passed through testamentary disposition by the beneficiary. The share also forms part of the estate of the deceased beneficiary. .

[10] From the foregoing, the court makes the following orders:

a) The grant issued to Grace Gakii and Lydia Kagwiria Daniel on 22nd March 2017 is confirmed.

b) The estate shall be distributed as follows:

L. R. ABOTHUGUCHI/GITHONGO/1187 shall be shared equally amongst:-

1. Ayub Meme M’Mugwika
2. Estate of John Mwobobia M’Mugwika
3. Janet Nyegera
4. James Mbaya M’Mugwika
5. Esther Nkatha M’Mugwika
6. Salome Kanyatta
7. Musa Kinyua M’Mugwika

No orders as to costs.

Dated, signed and delivered in open court this 28th day of May 2019

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F. GIKONYO

JUDGE

In presence of

M/s Kiome for petitioner Carlpeters holding brief

Ayub anampiu for interested party - Nyagera

Kiogora for Objector – M/s Mwilaria

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F. GIKONYO

JUDGE