



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 422B OF 2013

IN THE MATTER OF THE ESTATE OF ITUTI NAITIRA ALIAS ISAAC ITUTI (DECEASED)

RUFUS MBURUNGA M'ITUTI.....PETITIONER

VERSUS

BENJAMIN MBAYA.....1ST PROTESTOR

SILAS MWENDA RIUNGU.....INTENDED 2ND PROTESTOR

RULING

1. This ruling pertains to the Chamber Summons dated 13th June 2018 filed by the intended protestor seeking the following orders

1. That the application be certified as urgent and the same be heard on priority basis.
2. That the certificate of confirmation of grant issued on 18th September 2017 be set aside and its operation stayed pending the hearing and determination of this application interparties and protest herein.
3. That this honourable court be pleased to issue an order of inhibition against LR No. Abothuguchi/Ruiga/707, Abothuguchi/Ruiga/1 and Abothuguchi/Mariene/381 and all the resultants subdivisions pursuant to the certificate of confirmation issued by the court on 18th September 2017 forbidding the registration of any dealings pending the hearing and determination of the protest.
4. That this honourable court be pleased to allow and entertain the objectors protest in this case out if time
5. That costs be provided for.

2. The application was supported by the grounds on the face of it and the supporting affidavit and supplementary affidavit dated 28th February 2019 of Silas Riungu who deponed that Hezekiel Riungu is his father and a biological son to the deceased. Due to this, he is entitled to inherit the deceased estate as his father has since passed away. The petitioner herein omitted his name as one of the beneficiaries as per the certificate of confirmation issued on 18th September 2017. If the grant is not stayed and its operations suspended he stands to be disinherited and precluded from sharing in the deceased estate. In his supplementary affidavit, he indicated that his mother was never married to his deceased father however he attached a copy of his birth certificate which indicates that Hezekiel Riungu Ituti is his father.

3. The application was opposed by Rufus Mburunga M'Ituti in his replying affidavit dated 3rd August 2018 where he stated that the 1st protestors application was thrown out for want of prosecution and he has then incited the 2nd protestor to initiate this application. His deceased brother had one wife and five children. The 2nd protestor had never been introduced to the family and therefore he is a stranger to the suit. Moreover, this is an old matter where titles have been issued and the matter should be dismissed with costs.

4. The application was canvassed by way of written submissions where the 2nd protestor contended that he qualifies as a beneficiary according to section 38 of the Law of Succession Act. The 2nd Respondent relied on the Court of Appeal Case of **Christine Wangari Gachigi v. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR** where it was held

“Although Sections 35 and 38 of the Laws of Succession Act is silent on the fate of surviving grandchildren whose parents’ pre-deceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of

representation is applicable. The law on this is section 41. If a child of the intestate has pre-deceased the intestate then that child's issue alive or *en ventre sa mere* or that date of the intestate's death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate takes between them the share their parents would have taken had the parent been alive at the intestate's death."

5. The 2nd Respondent further submitted that the court can issue orders sought after judgement as it has increasingly become clear that the current constitution jurisprudence is moving away from technicalities and towards substantive justice and this was captured by Rule 73 of the Probate and Administration Rules which provides that;

"Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the courts"

6. On the other hand the petitioners in their submissions argued that the 2nd protestor is a total stranger to the estate of the deceased and is not a grandson to the deceased and that the birth certificate produced does not prove that the 2nd protestor is the son of Hezekiel Riungu Ituti. They relied on Re Estate of Patrick Mwangi Wathiga (deceased), Nyeri H.C.Succ.Cause No.343 of 2005 (2015) eKLR where Justice J.M. Mativo made the following remarks:-

"In my view, the practice of persons emerging after the demise of a dead person purely to claim a share of properties of the dead person should be discouraged unless the alleged claimant can demonstrate that there were attempts to have him or her recognized as a beneficiary/member of the family during the deceased's life time or the deceased left clear instructions to that effect, or his claim can be reasonably inferred from the express or implied circumstances of the case including the conduct of the deceased or from such reasonable or probable circumstances that can be proved by way of evidence. Alternatively, such a claim can also be admitted if the claimant demonstrates that he was prevented from associating with the deceased during the deceased's life time by either infirmity of body or mind or both or any other reasonable circumstances. In my view, where someone remains delinked from a family or the person he claims to be a parent for 24 years and only emerges after his/her death, the burden lies on him/her to establish his claim to the deceased's estate and to tender such evidence as may be necessary to establish his claim ..."

7. The Administrator submitted that the protestor filed his protest five years after the filing of this succession cause and he has not given explanation as to why he took so long. The deceased herein did not recognize the 2nd protestor as his grandson and additionally he did not attend the funeral of the deceased therefore this is a clear attempt for the protestor to disinherit the deceased estate.

8. I have carefully examined the application, affidavits, submissions and the record in its entirety and the issues to be determined are

a. Whether the 2nd Protestor as established the satisfaction of the court that he is a beneficiary of the deceased estate and that he is entitled to a share of the estate.

b. Whether the 2nd Protestor brought his claim to late in the day to be considered by the court.

9. On the first issue the 2nd protestor herein claims to be the grandson of the deceased. He produced a certificate of birth marked as SMR 1 annexed to his affidavit sworn on 28th February 2019 to show that Hezekiel Riungu Ituti (now deceased) was his father. In annexure SMR 2 the chief of Gatimbi location wrote a letter to the Administrator herein asking him to solve the issue of the 2nd Protestors claim that he is a son of Hezekiel Riungu Ituti. The mother of the 2nd Protestor Susan Kathure Kaburia also recorded her statement in support of the claim that she gave birth to the 2nd Protestor and that Hezekiel Riungu is the one who made her pregnant when she was 14 years old. She claimed that Hezekiel Riungu was ordered to pay maintenance in Nkubu court and he did that for 18 years. There was no evidence brought to controvert the authenticity of the certificate of birth produced by the 2nd protestor and therefore this court will take it that the 2nd protestor has proved prima facie that he is the son of Hezekiel Riungu and therefore the grandson of the deceased herein. In that regard, as Justice Musyoka Stated in the Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR Musyoka J. stated:

".....grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grandchildren inherit from the parents. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents."

10. Therefore, I find that the 2nd protestor is a dependant in this suit and he should share in the estate of the deceased herein.

11. The Estate of the deceased was distributed on 18th September 2017. LR No. Abothuguchi/Mariene/381 was to be shared equally amongst the sons of the deceased and Janet Gaceri Riungu was to hold the share that was due to Hezekiah Riungu in trust for herself and for the children of Hezekiah Riungu in equal shares. In that regard, the 2nd Protestor herein should be included as a beneficiary in that share.

12. LR No. Abothuguchi/Ruiga/707 was also to be distributed among the sons equally with Janet Gaceri Riungu holding the share of Hezekiah Riungu in trust of herself and the children of Hezekiah Riungu equally and the 2nd protestor should also be considered for the share for Hezekiah Riungu.

13. LR Abothuguchi/Ruiga/1 – was to be shared by the deceased persons children by way of boundary and therefore the area identified for Hezekiah Riungu should be held by Janet Gaceri for herself and her children.

14. The application by the 2nd Protestor is therefore allowed with no orders as to costs.

HON A. ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED THIS 26TH DAY OF SEPTEMBER 2019

IN THE PRESENCE OF:

CA:Mr Kinoti

PETITIONER:- Mr Miriti Advocate holding brief for Ogoti for Petitioners

1ST PROTESTER:- Mr Ojiambo Advocate for Protester

2ND PROTESTER:-

HON A. ONG'INJO

JUDGE

Mr Ojiambo:

We pray to be supplied with a copy of ruling.

Order: Allowed as prayed – copying charges.

HON A. ONG'INJO

JUDGE