



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE NO. 452 OF 2014

IN THE MATTER OF THE ESTATE OF MURU MATHANJUKI (DECEASED)

JESKA MUTHANJE MURU.....PETITIONER/APPLICANT

VERSUS

LEONARD NTHANJUKI WAMURUH.....1ST PROTESTOR

NANCY IVETI MURU.....2ND PROTESTOR

JULIA MARIGU MURU.....3RD PROTESTOR

J U D G M E N T

A. Introduction

1. By an application dated 23/02/2015, the petitioner sought confirmation of grant made on 12/02/2015 in her favour in estate of the deceased estate in the instant matter.
2. The protester in his affidavit sworn on 24/06/2015 opposed the mode of distribution arguing that the **LR. Nos. Kagaari/Weru/ 7002** (0.40Ha) and **7003** (0.20Ha) being resultant parcels on subdivision of the original parcel No. Kagaari/Weru/3805 (0.60Ha) ought to be registered jointly in the names of the 2nd and 3rd protesters as well as one Mary Rwamba Peter (referred to as Mary Mwenda Peter).
3. The petitioner lodged a reply to the protest sworn on 16/10/2015 denying the Protestors' claim.
4. The court gave directions that the matter be heard by way of viva voce evidence.

B. Protestors' Case

5. PW1, the first protester testified that the deceased had two wives being the petitioner and one Jecklia Rwamba and that the family of his mother Jecklia Rwamba was not involved by the petitioner when she applied for letter of administration and in the mode of distribution which was not favourable to him. PW1 proposed that the deceased's estate be divided as entailed in his affidavit of protest.
6. PW2, a sister to PW1, testified that she was left in the care of her grandmother when her mother, Jeckilia Rwamba, left the deceased. PW2 concedes that her grandmother, the petitioner and the deceased stayed in the same land and that the deceased educated her. PW2 further testified that land parcels L.R. Nos. Kagaari/Weru/7002 and 7003 are subdivisions parcels arising out of L.R. No. Kagaari/Weru/3865 and that herself and her sister have been using the aforementioned parcels for cultivation for a period of over three years. PW2 also stated that land parcels L.R. Nos. Kagaari/Weru/7002 and 7003 ought to be consolidated and shared as the deceased had directed.
7. PW3 Jecklia Rwamba testified that she divorced the deceased in 1974 but did not remarry and that despite the divorce she and the deceased were good friends. She denied abandoning her children with the deceased after the divorce. She further testified that the deceased had told her that none of his wives would inherit directly from his estate but they would do so through his sons, the 1st protestor on her side and one Morris Mbogo on the side of the petitioner.

C. Petitioner/Applicant's Case & Submissions

8. The petitioner testified that the protesters' mother, Jeckilia Rwamba, divorced the deceased in 1974 and she went ahead to remarry. She testified that the deceased shared out his land during his lifetime however there were some without title deeds, specifically, Marigu, Iveti and Kariuki.

9. DW1 further testified that the 1st protestor had his own land but had neglected to collect his title deed. She further testified that his son Kariuki had no land but is entitled to ½ an acre from her land of which the 1st protestor is also entitled to a similar share of ½ an acre. She further testified that the land at Kagaari/Weru/3805 was set aside for the deceased's daughters and that the deceased had obtained consent to subdivide the same to his three daughters prior to its current subdivision. She further testified that her daughter, Mary Mwenda took one portion of the resultant sub-division.

10. DW2, Mary Rwamba Peter testified that the protestors were children of the deceased. She further testified that the deceased intended Kagaari/Weru/3805 to be bequeathed to his daughters. She however denied taking the resultant portion of the subdivision of Kagaari/Weru/3805 that was next to the tarmac as alleged by the protestors.

11. DW3, Justin Nyaga Wamuru testified that he is the deceased's first born son. He testified that his mother, the petitioner lived at the deceased's land in Kigumo where the deceased had stated the 1st protestor get ½ an acre and similarly Moses was to get a similar share. He further testified that Jeckilia had divorced the deceased sometime in 1974 after which she had proceeded to remarry one Christopher Kuruga who had since passed on. As such it was argued that Jeckilia was not entitled to inherit any part of the deceased's estate.

D. Analysis & Determination

12. I have considered the protest herein and it is my view that the issues for determination herein are twofold; the mode of distribution of the deceased's estate proposed by the parties and whether Jeckilia Rwamba is entitled to benefit from the deceased's estate.

13. From the evidence of both parties, it appears that the deceased had expressed his desire on how his estate was to devolve to his beneficiaries. It is important to note that the deceased died intestate and the relevant law applies. However, matters that are in the agreement of the parties must be taken into consideration.

14. It came out in the testimonies that land parcel No. Kyeni/Mufu/ 5024 was to be bequeathed the son of the deceased Morris Mbogo wholly. LR. Kagaari/Weru/3805 which was later subdivided into Kagaari/Weru/7002 and 7003 was to be bequeathed to the deceased's daughters.

15. The protestor assert that the deceased wished the said parcel LR. Kyeni/Mufu/5997 do devolve in one part to himself and in trust of his mother, Jeckilia Rwamba whereas the petitioner states that the deceased wished the same devolve in terms of ½ an acre each to the 1st protestor and Moses Kariuki Muru with the remainder devolving to herself.

16. As to whether Jeckilia Rwamba is entitled to benefit from the deceased's estate, it is noted that it is in no doubt that the Jeckilia was married to the deceased and that they had divorced in 1974. It was alleged that she remarried one Christopher Kajuga.

17. Under Section 40(1) of the Law of Succession Act:

“Where an interstate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unto to the number of children.”

18. The protestors allege that Jeckilia Rwamba remained a wife to the deceased and even if they physically lived separately due to certain differences, that relationship subsisted. Moreover, for purposes of Law of Succession, then even if she were to be considered as having separated from the deceased, then she would be considered a former wife and therefore a dependant within the meaning of **Section 29** of the **Law of Succession Act**.

19. The petitioner and her witnesses acknowledge that the deceased and Jeckilia were married and had children who are the protestors. Later they separated and Jeckilia went to stay at Kigumo market. However, the petitioner stated and this was un rebutted, that after the deceased and Jeckilia divorced, the deceased moved back to his home and terminated the relationship.

20. It is trite law that he who asserts must prove his case. No evidence was adduced by the protestors to support their claim that Jeckilia was a dependant of the deceased in terms of Section 29 of the law of Succession Act which defines a dependant as “a wife or wives or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death”. Evidence was adduced to the effect that Jeckilia was married and divorced under customary law. It is important to note that Jeckilia was only called as a witness by her son, the protestor. It can be rightly held that Jeckilia was not interested in the estate of the deceased because she did not join in the cause to defend her interest. From the court's observation, Jeckilia was a person of sound mind possessed of the capacity to defend her interest in the estate.

21. I therefore find that Jeckilia in my considered opinion is not a wife in accordance to **Section 3(5) of the Act** and so she is not entitled to inheritance as a wife.

22. Turning to the mode of distribution of the deceased's estate, I do note that the parcels in contention between the parties are land parcels Nos. Kagaari/Weru/7002 and 7003 and Kyeni/Mufu/5997.

23. Land parcels Nos. Kagaari/Weru/7002 measures 0.40 Ha. while 7003 is 0.20 Ha. Being resultant parcels of the subdivision of LR. Kagaari/Weru/3805. The issue of contention regarding this parcel according to the protestors is the action of their step-sister, Mary Rumba Peter, to proceed firstly with the subdivision of the original Kagaari/Weru/3805 on her own and then to take the portion closest to the tarmac which is of higher value. This is denied by Mary Rumba Peter who states that her step-sisters, the 2nd and 3rd protestors were well aware of

the subdivision of Kagaari/Weru/ 3805 and have been working on their estate Kagaari/Weru/7002 where they even harvested indigenous trees for timber and firewood.

24. I have perused the evidence before me and I am convinced that the subdivision of Kagaari/Weru/3805 which was done during the lifetime of the deceased was above board. Furthermore, each of the daughters has 0.20 hectares and as such are on equal standing. For these reasons, I do not wish to disturb the current distribution regarding L.R. Kagaari/Weru/3805.

25. Having established that Jeckilia Rwamba is not a wife in accordance to Section 3(5) of the Act, it is my considered view that the fair mode of distribution should be one that will not favour any beneficiary against another. The three beneficiaries ought to share the land equally in accordance with Section 40 of the Law of Succession Act.

26. Following the wishes of the deceased will put some of the beneficiaries at a disadvantage. The deceased died intestate and this court is empowered to distribute the asset equitably.

27. I reach a conclusion that the protest is only partly successful.

28. It is my considered opinion that the following mode of distribution be and is hereby ordered: -

a) Kyeni/Mufu/5024 devolves to Morris Mbogo wholly.

b) Kagaari/Weru/7003 devolves to Mary Rumba Peter

c) Kagaari/Weru/7002 devolves to Nancy Iveti Muru and Julia Marigu Muru jointly in equal shares.

d) Kyeni/Mufu/5997

i. 1/3 share Leonard Nthanjuki Wamuruh,

ii. 1/3 share Moses Kariuki

iii. 1/3 share Jeska Muthanje Muru.

29. Certificate of confirmation to issue.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF OCTOBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

3 Protesters

Petitioner