



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 84 OF 2007

IN THE MATTER OF THE ESTATE OF THE LATE SAMUEL M'MWAMBA

DOMINIC CHARLES MUTHUURI.....PETITIONER

VERSUS

PETER KARIUKI MWAMBA.....RESPONDENT

SARAH MPINDA SAMUEL.....OBJECTOR/APPLICANT

JUDGMENT

1. Samuel M'Mwamba died on 15th March, 1977. He left behind two widows, six sons and nine daughters. On 29th March 2007, his son, Dominic Charles Muthuuri ("the petitioner") applied for the grant of Letters of Administration Intestate.

2. In Form No. P & A 5, the petitioner listed the following as the beneficiaries of the estate:-

a) 1st House - Salome Nkirote Samuel

- i) Peter Kiruki Mwamba - Son
- ii) Benson Kairigu Mwamba - Son
- iii) Dominic Charles Muthuuri - Son
- iv) Samuel Ntarangwi Mwamba - Son
- v) Priscilla Kajuju Mutuma - Married daughter
- vi) Sr. Regina Kanjiru Mwamba - Unmarried Nun

b) 2nd House - Sarah Mpinda Samuel

- i) Japheth Kinoti Mwamba - Son
- ii) Nathan Ngugi Mwangangi - Son
- iii) Julia Ngugi Mwangangi - Married daughter
- iv) Truphosa Nduru Kaburu - Married daughter
- v) Martha Kaguru Mwamba - Married daughter
- vi) Charity Karambu Gituma - Married daughter
- vii) Jennifer Kithira Gichiri - Married daughter

- viii) Naomi Karea Samuel - Unmarried daughter
- ix) Esther Kananu Bundi - Married daughter
- x) Dennis Mwinga - Grandson

3. The petitioner also listed the following as the properties constitute the estate:-

- a) Abothuguchi/Ruiga/1415 - 0.40ha
- b) Abothuguchi/Ruiga/1416 - 3.05ha
- c) Abothuguchi/Ruiga/51 - 2.07ha
- d) Abothuguchi/Ruiga/300 - 0.26ha
- e) Abothuguchi/Ruiga/956 - 2.8ha
- f) Abothuguchi/Ruiga/896 - 0.63ha
- g) Abothuguchi/Ruiga/418 - 5.42ha
- h) Plot at Gaitu market
- i) 1,400 Coffee trees in (b) above
- j) Nine heads of cattle
- k) 160 mature trees on both (a) and (b) above

4. On 2nd May, 2008, Sarah Mpinda Samuel (“the objector”), the deceased’s 2nd wife filed an objection to the making of grant, Answer to Petition and a Cross-Petition. In the objection, she alleged that the petitioner had in the schedule included properties that did not form part of the estate while leaving out Plot No.20 ‘A’ Gatimbi Market which belonged to the estate. She further contended that the petitioner was working in cahoot with Salome Nkirote Samuel, her co-wife with a view to deprive her and her children their rightful share. She also claimed that she ranked higher to the petitioner in petitioning for letters of administration.

5. On 15th October, 2009, a grant of Letters of Administration was issued to both Dominic Charles Muthuuri and Sarah Mpinda Samuel and on 19th January, 2011, the objector applied for the confirmation of the grant and gave her own mode of distribution of the estate.

6. On 7th March, 2011, the petitioner filed a protest to the objector’s proposed distribution and set out his own mode. On 5th December, 2017, learned Counsel agreed that the protest be determined on the basis of the affidavits on record and submissions. The court directed the parties to file their submissions within 60 days and appear in court on 5th February, 2018 for hi-lighting. However, when the matter came up for hi-lighting, none of the parties had filed submissions and the court decided to write this judgment without the benefit of submissions of learned counsel.

7. From the evidence on record, the deceased was polygamous and had two houses. The objector excluded some of the beneficiaries from her distribution on the grounds that they had been taken care of by the deceased during his lifetime. This can be discerned from paragraph 4 of the protest. Those left out were, Peter Kiruki Mwamba and Benson Kairigo Mwamba. It was averred, without denial that the three had benefited from Abothuguchi/Ruifa/1415, 1416 and 51. The said properties are said to have been bought by the deceased.

8. On his part, the petitioner included Peter Kiruki Mwamba and Benson Kairigo Mwamba in his proposed distribution on the grounds that he intends to file a suit for declaration of trust over the said properties. He averred that he had attempted to sue Peter Kiruki Mwamba over the said properties but the decision of the Land Dispute Tribunal was quashed for lack of jurisdiction.

9. **Section 40 of the Law of Succession Act, Cap 160 Laws of Kenya** makes provision regarding intestate who are polygamous. The section provides:-

“40. (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate 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 a additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate shall then be in accordance with the rules set out in sections 35 to 38.

10. On the other hand, **Section 42 of the Act**, provides:-

“42. Where –

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

11. From the foregoing, two principles arise regarding distribution. Firstly, that in a polygamous set up, each child of the deceased constitutes a unit. In the event any widow is surviving, she will constitute an additional independent unit. Secondly, in the event any beneficiary was taken care of or was provided for during the lifetime of the deceased, that share will be taken into consideration at the time of distribution. In my view, these two principles are geared towards ensuring equity in the distribution of estates of deceased persons. In the present case, the two widows of the deceased are said to be alive. They will therefore form separate independent units

12. Flowing from the foregoing, the proposal by the petitioner that he will sue Peter Kiruki and Benson Kairugi for a declaration of trust does not arise. The proper procedure would be, in the event the estate is large enough so as the share due to each beneficiary exceeds what the two received from the deceased, the two should be included in the distribution but at all times having in mind that they had already been taken care of to the extent they had been catered for.

13. I have perused the entire record, the parties did not file the respective Certificates of searches. However, in Form P&A 5, the petitioner disclosed that the following properties are owned by the respective beneficiaries in trust as follows:-

- a) Abothuguchi/Ruiga/1415 – 0.40ha - Dominic Charles Muthuuri
- b) Abothuguchi/Ruiga/1416 – 3.05ha - Peter Kiruki Mwamba
- c) Abothuguchi/Ruiga/1415 – 2.07ha - Benson Kairigo Mwamba

14. None of the beneficiaries denied that the aforesaid properties were acquired by resources of the deceased. In this regard, I make a finding that the above-named beneficiaries had been catered for by the deceased to the extent of the said properties during the lifetime of the deceased.

15. One of the challenges in this matter is that the parties did not file any valuation in respect of these properties. In this regard, I will effect distribution based on the sizes disclosed on record having in mind the proposals given by the petitioner and the objector. The total acreage of the properties forming the estate is 9.11 ha, that is equivalent to 22.50 acres. In the present case, the two widows of the deceased are said to be alive.

16. Both the objector and petitioner agree that Plot No. 6 “A” Kaguma Market which is developed do go to Nathan Mugambi Mwamba. I will not disturb that distribution.

17. Both the petitioner and the objector are in agreement that the widows will hold the shares distributed to them together with the daughters of the deceased. While the objector has only distributed to herself to hold in trust for her daughters and left out the daughters of her co-wife, the petitioner has proposed that the widows do hold a share of 3.4 acres in trust for their respective daughters.

18. In view of the foregoing and taking into consideration that Peter Kiruki, Benson Kairigo and Dominic Charles Muthuuri had already been given 7.53 acres, 5.11 acres and 0.98 acres respectively, I will distribute the estate as follows:-

a) Plot No. 6 “A” Kaguma Market

Nathan Mugambi Mwamba

b) Abothuguchi/Gaitu/418 (13.4 acres)

- i) Dominic Charles Muthuuri - 1.5 acres
- ii) Samuel Ntarangwi Mwamba - 1.5 acres
- iii) Nathan Mugambi Mwamba - 3 acres
- iv) Japhet Kinoti Muuna - 3 acres
- v) Sarah Mpinda Samuel - 4.4 acres
- Salome Nkirote Samuel - 4.4 acres

To hold on their own behalf and in trust for Naomi Karema Samuel, Charity Karambu Samuel, Martha Kaguri Samuel, Jenniffer Kathira Mwamba, Triphosa NduruMwamba, Julia Ngugi Mwamba, Esther Kinanu Mwamba, Priscilla Kajuju Mutuma & Regina Kanjiru Mwamba in equal shares.

c) Abothuguchi/U-Kaongo/956 (6.9 acres)

i) Dominic Charles Muthuuri - 3.45 acres

ii) Samuel Ntarangwi Mwamba - 3.45 acres

d) Abothuguchi/Ruiga/896 (1.56 acres)

Japheth Kinoti Mwamba - Whole

e) Abothuguchi/Ruiga/300 (0.64 acres)

Nathan Mugambi Muuna - Whole

17. In view of the foregoing, it is clear that Peter Kiruki Mwamba and Benson Kairigo Mwamba had been catered fully having received 7.53 acres and 5.11 acres, respectively. I am of the view that the foregoing distribution takes into consideration the principle of equity.

It is decreed accordingly.

DATED and DELIVERED at Meru this 21st day of March, 2018.

A. MABEYA

JUDGE