



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 593 OF 2015

In the Matter of the Estate of Francis Murungi M'Itwamikwa (Deceased)

STELLA MWARI PETITIONER

-Versus-

ESTHER NKIROTE PROTESTOR

JUDGMENT

Polygamous intestate

[1] Before me is Summons for Confirmation of Grant dated 14th February 2017. The confirmation sought is of Grant of Letters of Administration made to Stella Mwari Muriungi and Esther Nkirote on 30th November 2015. But, Esther Nkirote filed a protest on 23rd August 2017 which I should also determine as required by rule 41 of the Probate and Administration Rules. Parties agreed that I decide distribution on the basis of the papers filed including the witness statements.

[2] In the affidavit of protest, Esther proposed the estate to be distributed as follows;

a. NYAKI/GIAKI/1518 Approx. 4 acres

To Esther Nkirote

b. NYAKI/GIAKI/KIBURINE/326 Approx. 2 acres

To Stella Mwari

[3] She gave reasons for her proposal; that Stella Mwari who is her co-wife, was given land parcel number 326 by the deceased and she was given land parcel number 1518; (2) that Stella has never cultivated land parcel number 1518; and (3) that Stella sold parcel number 326 to other persons. An agreement on distribution of the estate between the two was filed in court by the protestor. She also filed witness statements by Stephen Gatobu Mikwa and Moses Murithi Ndegwa. Both witnesses stated that Stella was given parcel number 326 but she sold it. Stephen added that he was a witness in the said sale agreement.

[4] Stella proposed that she gets the whole of parcel number 326 and 1 acre in number 1518. Esther should get 3 acres in number 1518. Her reason is that she has more children than Esther. She listed the children for each house as below:-

Stella Mwari Muriungi's Children

1. Caroline Ntinyari – Daughter

2. Jacob Mwirigi Muriungi – Son

3. Silas Nturibi (Deceased but survived by Precious Muthoni)

4. Leah Gatwiri – Daughter

5. Janet Nkirote – Daughter

6. Faith Kanana – Daughter

Esther Nkirote's Children

1. Daniel Mwiti – Son

2. Samuel Mutiga – Son

3. Ann Kinya – Daughter

4. Stanley Kubania - Son

She filed record of parcel number 1518. She also filed witness statements by Caroline Ntinyari and Leah Gatwiri who supported her proposal and reason thereof.

ANALYSIS AND DETERMINATION

[5] The estate properties are:-

a. NYAKI/GIAKI/1518Approx. 4 acres

b. NYAKI/GIAKI/KIBURINE/326Approx. 2 acres

[6] The deceased had two wives. Therefore, there are two houses in this estate. Under section 2 of the Law of Succession Act:-

“house” means a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife;

[7] Accordingly, section 40 of the Law of Succession Act applies in this cause. The said section provides that:-

40. Where intestate was polygamous

(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 an additional unit to the number of children.

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

[8] In essence, the principle of equity applies here as distribution is in accordance with the number of children in each house plus any surviving spouse. The 1st house has 6 children plus their mother which makes 7. The 2nd house has 4 children plus their mother which makes 5. Land parcel number 326 is approximately 2 acres while number 1518 is approximately 4 acres. I note the agreement between the two wives. It did not involve the other beneficiaries; the children. I therefore reject it.

[9] I also note allegations that Stella sold land parcel number 326 to third parties. The official search provided as at 15th January 2015 shows that the registered owner of number 326 is the deceased. I do not find any evidence to the contrary or to back claims of sale of parcel number 326 by Stella. In any case, any sale of estate's immovable property before confirmation of grant will be null and void for being unlawfully acquired. As both parties acknowledge, the estate property comprises in: **NYAKI/GIAKI/1518Approx. 4 acres** and **NYAKI/GIAKI/KIBURINE/326Approx. 2 acres**. Accordingly, the proposal by Stella is more equitable given the number of units in each house and I adopt it. The estate property shall be shared as follows:

a. NYAKI/GIAKI/1518Approx. 4 acres

1) Stella MwariMuriungi1 acre to hold on her own behalf and benefit and that of all her children, namely:-

a. Caroline Ntinyari – Daughter

b. Jacob Mwirigi Muriungi – Son

c. Silas Nturibi (Deceased but survived by Precious Muthoni)

d. Leah Gatwiri – Daughter

e. Janet Nkirote – Daughter

f. Faith Kanana – Daughter

2) *Esther Nkirote.....3 acres to hold on her own behalf and benefit and that of all her children, namely:*

a. Daniel Mwiti – Son

b. Samuel Mutiga – Son

c. Ann Kinya – Daughter

d. Stanley Kubania - Son

b. NYAKI/GIAKI/KIBURINE/326 Appox. 2 acres

Whole to Stella MwariMuriungi to hold on her own behalf and benefit and that of all her children, namely:-

a. Caroline Ntinyari – Daughter

b. Jacob Mwirigi Muriungi – Son

c. Silas Nturibi (Deceased but survived by Precious Muthoni)

d. Leah Gatwiri – Daughter

e. Janet Nkirote – Daughter

f. Faith Kanana – Daughter

[10] This being a succession cause, I order each party to bear own costs.

Dated, signed and delivered in open court at Meru this 23rd day of May 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Kaimenyi advocate for petitioner

Protestor in person – present

Petitioner - present

F. GIKONYO

JUDGE