



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 185 OF 2009

IN THE MATTER OF THE ESTATE OF M'ICHABA M'ARUNGU (DECEASED)

BENEDICT PIUS MARANGU M'ARUNGA.....PETITIONER

-VS-

JAMES P. RIUNGU.....OBJECTOR

J U D G M E N T

1. **M'ICHABA M'ARUNGU (“the deceased”)** to whom this Succession Cause relate, died on 16th March, 2004. On 2nd March, 2009, Senior Chief G. K. Magambo of Mitinguu Location wrote a letter of introduction wherein he introduced both the petitioner and the objector as children of the Deceased.

2. On 27th March, 2009, Benedict Pius Marangu, the Petitioner, petitioned for letters of administration of the estate intestate and set out the following as the survivors of the deceased:-

1. **Benedict Pius Marangu - Son**
2. **David Pius Mugambi - Son**
3. **Jacob Mpuhia Pius - Son**
4. **James Pius Riungu - Son**
5. **Rose Gaki Kamunde - Daughter**
6. **Priscilla Njeri Muthuri - Daughter**
7. **Marsu Gantuku Mburugu - Daughter (Married)**
8. **Lucy Kabugi Mburugu - Daughter (Married)**
9. **Anjelina Mpinda Gauku - Daughter (Married)**
10. **Christine Nkirote Kimaita - Daughter (Married)**
11. **Caroline Ngugi Kimaita - Daughter (Married)**
12. **Agnes Gauku Pius - Daughter (Married)**
13. **Mugito Pius - Daughter (Married)**
14. **Kagwiria Pius - Daughter**

- 15. **Karambu Pius** - **Daughter**
- 16. **Kanana Silas** - **Granddaughter**
- 17. **Jacline Karwitha** - **Grand daughter**
- 18. **Elsy Maken Silas** - **Grand Daughter**

3. He also set out parcel numbers **Nkuene/Mitunguu-Kithino/600**, **Nkuene/Mitunguu-Kithino/601** and **Nkuene/Nkumari/529** as the assets of the estate.

4. On 30th March, 2009 the petitioner sought to be granted limited letters of administration limited to gathering and preservation of the deceased's estate pending gazettelement in order to restrain the Respondent/Objector from intermeddling with the estate. The orders were issued on 14th April 2009.

5. Consequently, the Petitioner was gazetted on 22nd May 2009. However, an objection was raised by the Objector on the grounds that he was never requested to nor did he give his consent to the filing of this Cause. As a result, the court appointed both the petitioner and the objector as joint administrators on 8th October, 2009.

6. On 11th May, 2010, the Objector filed an affidavit in support of the summons for confirmation of the grant and proposed that the estate be distributed as follows:-

- a) **L.R. No. Nkuene/Mitunguu/Kithino/600** measuring 1.21Ha - To the children of the House of HARRIET KAMATHE PIUS
- b) **L.R. No. Nkuene/ Mitunguu/Kithino/601** measuring 1.21Ha – To the children of the House of MARTHA MUTHONI
- c) **L. R. No. Nkuene/Nkumari/529** measuring 8 acres – To be divided into two equal portions and each house to have one portion.

7. This was opposed by the Petitioner by way of a replying affidavit sworn on 15th September, 2011 wherein he deposed he had agreed with the rest of the family members that the estate be distributed as follows:-

- a) **L. R. No. Mitunguu/Kithino/600 & 601** to go to all the daughters in equal shares;
- b) **L. R. No. Nkuene/ Nkumari/529** be shared amongst the sons in terms of their occupation on the ground.

8. The petitioner contended that each of the beneficiaries knows their portion on the ground since it was done in the lifetime of the deceased. It is only the Applicant who had moved from his position on the ground where he has built a home and a temporary school on part of the land which is occupied by the children of Silas Njogu (who is deceased).

9. This matter was canvassed by way of written submissions. The Objector reiterated what he had stated in his affidavit. In addition, he supported his mode of distribution that the estate should be divided equally among the two houses. He referred to the case of **Re estate of John Musambayi Katumanga – deceased [2014] eKLR**. On the other hand, the Petitioner submitted that the estate ought to be distributed as follows:-

- i.) L. R. No. Mitunguu/Kithino/600 & 601 to all daughters equally
- ii.) L. R. No. Nkuene/ Nkumari/529 be shared as follows
 - a. Mutugi M'Mwobobia - 0.5 Acres (Grandchild who lives on suit land)
 - b. James Riungu Pius - 1.9 Acres
 - c. David Mugambi Pius - 1.9 Acres
 - d. Silas Njogu Pius (deceased) - 1.9 Acres to his children Purity Kanana Njogu, Elsy Makena Njogu, Jackline Karwitha Njogu and Felix Mutahi.
 - e. Jacob Mputhia Pius - 1.9 Acres

He further submitted that all sons getting shares in Nkuene/Nkumari/529 have built permanent buildings in their respective portions on the grounds and pray that each of them get his share of land where he has put permanent buildings.

10. I have considered the entire record, affidavits and submissions and the issue for determination is ***how should the estate of the deceased be distributed.***

11. The Objector asserts that the estate should be divided according to the houses since the Deceased had two wives. **Section 40 of the Law of Succession Act Cap 160 Laws of Kenya** provides:-

“(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.”

12. It is not in dispute that the deceased was polygamous. It was not contended that any of the widows is alive. The beneficiaries therefore are the children of the deceased. The application of the **Section 40** is in accordance with the number of children in each house so as to ensure that each child gets an equal share.

13. The application of **Section 40 of the Act** advocate for equality among the children and not houses as contended by the Objector. In **Re estate of John Musambayi Katumanga – deceased [2014] eKLR** it was held:-

“27. The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in section 35(5) and 38 is “equally” as opposed to “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”

14. Consequently, applying **section 40 of the Act**, distribution of the estate will be shared equally among the children. Only the five unmarried daughters of the deceased have signed a consent consenting to the mode of distribution in support of the application for confirmation of the grant made to the Petitioner. There is no consent from the other married daughters.

15. It should be noted that it does not matter whether or not a daughter is married or not. Under the law, all children including daughters irrespective of their marital status, are entitled to a share of their parents’ estate. In the case of **In re the Estate of the Late George Cheriro Chepkosiom (Deceased) [2017] eKLR** Mumbi Ngugi J, stated as follows:

“The law is that there is no distinction between female and male children of a deceased person, regardless of their marital status. Unless they expressly renounce their interest in the estate, daughters of the deceased cannot be disinherited simply on the basis that they are married. This contravenes not only the provisions of section 38 of the Law of Succession Act, but also the express non-discrimination provisions of Article 27 of the Constitution.”

16. Two sons of the deceased have since passed on but their children (grandchildren of the deceased) are said to live on the estate. Since it is not clear from the record who the children or grandchildren of the deceased are and in order to effect the provisions of **section 40 of the Act** as I have already held, I direct that:-

a) the administrator do file and serve within 30 days a detailed affidavit specifying all the children of the deceased those alive and deceased;

b) specify who the widows and children of the deceased’s children of the deceased are;

c) since it is only five daughters of the deceased who had supported the petitioner’s mode of distribution whereby all the daughters of the deceased were to share only one property, the administrator to either get the concurrence in writing of the other daughters or get their renunciation of their interest in the estate.

d) this matter be mentioned within 60 days to give final orders on distribution.

DATED and DELIVERED at MERU this 28th day of June, 2018.

A. MABEYA

JUDGE