



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

SUCCESSION CAUSE NO.170 OF 2015

(FORMERLY CHUKA SUCCESSION 70 OF 2009)

IN THE MATTER OF THE ESTATE OF M'MUCHEKE MUGWIKI (DECEASED)

MARY E. TIRINDI.....PETITIONER

VERSUS

JOYCE CIOMBA.....PROTESTOR

J U D G M E N T

1. This cause relates to the estate of **M'MUCHEKE MUGWIKI** who died intestate on 23rd July 2000 at a place called Mbogori village. The estate in this cause comprise the following properties namely:-

- a) Mwimbi/Chogoria/1439 (1.471 ha)
- b) Mwimbi/Chogoria/1438 (0.809 ha) and
- c) Mwimbi/Chogoria/310 (0.6 ha)

2. The documents filed together with the petition and specifically the letter from office of area chief dated 19th May 2009 indicates that the deceased died and left the following dependants namely:-

- (i) Assenath Nyoroka Mucheke (Widow- deceased)
- (ii) Mary E. Tirindi Teresia
- (iii) Catherine Kaari Nabea
- (iv) Anastasia Mukwaiti Mucheke
- (v) Idah Kagendo Githaka
- (vi) Eliud Kinyua Mucheke (deceased)
- (vii) Joyce Ciomba Kinyua wife to Eliud Kinyua
- (viii) Mercy Kagige Burini (deceased)

3. Mary. E. Tirindi Teresio was appointed the administratrix of the estate of the deceased herein and issued with a grant of Letters of Administration on 8th February, 2017. She has now moved this court for confirmation of the said grant and made the following proposal on the mode of distribution of the estate.

- a) **L.R. NO. MWIMBI/CHOGORIA 1438** (approximately 2 acres)- Joyce Ciomba.

b) **L.R. NO. MWIMBI/CHOGORIA/1439** (approximately 3.75 acres) to be shared jointly by Catherine Kaari Nabea , Anastacia Mukwaiti, Idah Kagendo, Mary E. Tirindi Teretisio and Sophia Kathambi to get 0.50 acres.

c) **L.R. No. MWIMBI/C. MAGUTUNI/310** approximately 1 1/2 acre. Mary E. Tirindi Teretisio - 1 acre

Catherine Kaari Nabea

Idah Kagendo to share 1/2 acre

Anastacia Mukwaiti

(d) **PLOT NO. 10'A' KIANGUA MARKET** to be shared by:-

(i) Benard Mucheke

(ii) Burine Kaithungu Jointly

(iii) Muga Karaithe

4. Joyce Ciomba, the daughter in law to the deceased and wife to Eliud Kinyua - the deceased son to the deceased has filed a protest through affidavit of protest sworn on 1st November, 2017. According to her parcel No. Mwimbi/Chogoria/1438 had been purchased by her late husband and therefore should not be a subject of distribution. She has proposed that the other remaining properties that is;

(1) Mwimbi/Chogoria/1439

(2) Mwimbi/C.Magutuni/310 and

(3) Plot No.10 Kiangua Market should be distributed equally among the following surviving dependants:-

(i) Mary E. Tirindi

(ii) Catherine Kaari Nabea

(iii) Anastacia Mukwaiti

(iv) Idah Kagendo

(v) Joyce Ciomba for herself and her children.

5. At the hearing of the protest the administratrix told this court that her late father, the deceased herein gave an acre of land No. Mwimbi/Chogoria/1437 as a gift during his lifetime apparently because she used to take care of him when he was sick. She further told this court that she later sold the portion for her own benefit. It was her evidence that her late father also gifted parcel No. Mwimbi/Chogoria/1438 to her late brother Eliud Kinyua but on condition that he pays Kshs.10,000/- which condition was not met hence the reason why the parcel was not formally transferred to him.

6. The protestor testified and admitted that her late husband was required to pay Kshs.10,000/- to the deceased to formalize the transfer of parcel No. Mwimbi/Chogoria/1438. She told this court that her late husband did not pay the amount required as he could not raise the money at that moment in time.

7. There is no dispute that the deceased had made his intention known that he intended to transfer L.R.No. Mwimbi/Chogoria 1438 to his son, the late Eliud Kinyua on condition that he pays Kshs.10,000/-. The gift was therefore conditional. This court has gone through the application for consent of Land Control Board and the consent itself. It is clear that the transfer was hinged on a consideration of Kshs.10,000/- clearly indicated on the said forms. That money as conceded by the protestor herself was never paid. The transfer never happened and at the time the deceased passed on parcel No.Mwimbi/Chogoria /1438 was and is still part of the estate of the deceased. It cannot be considered a gift because of the consideration which the late Eliud Kinyua never met. The transfer did not take any effect. The only transfer that can legally be considered as a gift intervivos is that property known as Mwimbi/Chogoria/1437 which was gifted to the administratrix herein.

8. On the question of Sophia Kathambi's claims, this court finds that the claim has not been proved. Sophia Kathambi or any of the witnesses did not tender any evidence to prove any of the following:-

(i) That the deceased in this cause entered into any legal transaction to transfer part of his estate to the said Sophia Kathambi.

(ii) That any payment in consideration was paid for purchase of 1/2 an acre or any part thereof and that the transaction was okeyed by the Land Control Board.

In the absence of evidence the stake of Sophia Kathambi on the estate is not sustainable in law and the only way she can benefit is through her mother just like any of the grandchildren of the deceased.

9. It is clear from the brief evidence orally presented to this court and affidavits filed that the deceased died intestate and left the following children:-

- (i) Mary E. Tirindi (administratrix)
- (ii) Catherine Kaari Nabeya
- (iii) Joyce Ciomba
- (iv) Anastacia Mukwaiti
- (v) Idah Kagendo

10. The provisions of **Section 38** gives guidelines on how an estate of a deceased person who dies intestate without a spouse should be distributed. The law clearly provides that the net estate should be equally divided among the surviving children.

Going by the above provisions of law this court find that it will be fair and just to let Joyce Ciomba retain 2 acres of land comprised in L.R No. Mwimbi/Chogoria /1438 in view of the developments and attachments to the property in regard to her late husband Eliud Kinyua (deceased). This court was made to understand that the deceased only owned a share of that property known as plot 10 at Kiangua market. That share shall be jointly owned by the following:-

- (i) Mary E. Tirindi
- (ii) Catherine Kaari Nabeya
- (iii) Anastacia Mukwaiti
- (iv) Idah Kagendo
- (v) Joyce Ciomba The property comprised in L.R No. Mwimbi/Chogoria/ 1439 shall be shared equally among the following:-
 - (i) Catherine Kaari Nabeya
 - (ii) Anastacia Mukwaiti
 - (iii) Idah Kagendo

Mary E. Tirindi got a gift (1 acre) from the deceased during his life time and **Section 42 of Law of Succession Act** provides that such gift shall be taken into account when determining the share going to that beneficiary and so having gotten one acre, I direct that she get **0.60 acres** out of Mwimbi/Chogoria/1439. Mwimbi/C.Magutuni/1310 shall be equally divided as follows:-

- (i) Catherine Kaari Nabeya
- (ii) Anastacia Mukwaiti
- (iii) Idah Kagendo

11. The estate of the late M'Mucheke Mugwika shall therefore be distributed as follows:-

a) L.R. No. Mwimbi/Chogoria/1438

Whole to Joyce Ciomba to hold for her own benefit and in trust of her children Sammy Mawira, Gerald Kinoti, Humphrey Kaburu, Betty Mwenda, Elosy Muthoni and Doreen Kinya

b) L.R. No. Mwimbi/Chogoria/1439

Mary E. Tirindi - 0.60 acres

Catherine Kaari Nabeya

Anastacia Mukwaiti to share equally

Idah Kagendo

c) L.R. No. Mwimbi/C.Magutuni/310

Catherine Kaari Nabea

Anastacia Mukwaiti to share equally

Idah Kagendo

d) Plot 10 A Kiangua market. The share of the deceased to be shared as follows:-

Mary E. Tirindi

Catherine Kaari Nabea

Anastacia Mukwaiti jointly

Idah Kagendo

Joyce Ciomba

12. The grant of letters of administration made on 8th February 2017 is hereby confirmed as per the above distribution of the estate. There is no order as to costs so each party to bear own costs. I also direct that the transfer and transmission documents be executed by all beneficiaries and in default or reluctance by any of the beneficiaries, the Deputy Registrar of this court to execute on behalf of any reluctant party.

Dated, signed and delivered at Chuka this 18st day of June, 2018.

R.K. LIMO

JUDGE

18/6/2018

Judgment signed, dated and delivered in the presence of the Petitioner and Mugo for the protestor.

R.K. LIMO

JUDGE

18/6/2018