



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 160 OF 2000

In the Matter of the Estate of Mwiraria Munyua (Deceased)

SARAH KINYA.....PETITIONER

Versus

DANIEL MUTHURI & 5 OTHERS....APPLICANTS

JUDGMENT

[1] These proceedings relate to the estate of Mwiraria Munyua (“the deceased”). The estate property is land parcel **Nyaki –Gitaki/79 measuring 4.02 HA**. In the Summons for Confirmation of the Grant the Petitioner proposes that the estate be distributed as follows:

*a) Morris Muthaura ..... 2 Acres*

*b) Martin Mburugu Mwiraria .. 2 Acres*

*c) Dennis Munene Mwiraria ... 2 Acres*

*d) Jerica Kiende Kaura ..... 2 Acres*

*The balance to be shared among:-*

*e) Sarah Kinya Ngeera )*

*f) Virginia Makena Mwiraria*

*g) Gladys Karainto*

*h) Nancy Mukiri Mwiraria*

[2] The Protestors herein namely: Daniel Muthuri M’Munyua, Anastasia Kagete, Jerica Kiende, Rose Kamenwa, Catherine Kinairi and Defina Karee opposed the mode of distribution proposed by the Petitioner. In an affidavit of protest filed on 31<sup>st</sup> March 2017 they attacked the petition that; (1) it is defective and was produced by fraud, collusion or perjury; and (2) was filed secretly without their knowledge and their consent as persons of equal or lesser priority was not obtained as required by law considering that the deceased was their sibling.

**Submissions**

[3] By consent of parties and order of court made on 22<sup>nd</sup> May 2017 the protest was canvassed by way of written submissions. The protestors submitted that their deceased brother held the estate in trust for them as it consisted in Scheme land delineated during the colony and protectorate of Kenya. Therefore, each of them has a right to inherit a share comprising in **L.R. NO NYAKI/GIAKI/79** of which their deceased brother held in trust for them and proposed it be distributed as follows:

1. Daniel Muthuri - ½ Acre

2. Josephat Mwirari M’Munyua - 4 Acres

3. Jerica Kaura M'Munyua - 4 Acres
4. Anastacia Kagete M'Munyua - ½ Acre
5. Delphina Karee M'Munyua - ½ Acre
6. Rose Kamenua M'Munyua - ½ Acre
7. Catherine Kinairi M'Munyua - ½ Acre

[4] The Petitioner opposed the protest and submitted that the deceased is a brother to Daniel Muthuri, Anastacia Kagete, Rose Kamenwa, Katherine Kinairi, Delfina Karee and brother in law to Jerica Kaura wife to his brother the late Francis Kaura M'Munyua who are all children of M'Munyua. At the time of filling the succession the only known beneficiaries with a claim to the estate of the deceased were the Petitioner and her children. Her proposed mode of distribution of the estate is amongst the said beneficiaries. It was submitted that Section 35-39 of the Law of succession Act CAP 160 outlines the rules of intestacy in the estate of a deceased person. And that Section 35 applies in this case for the petitioner and her children are the only surviving beneficiaries of the estate who live on the subject parcel of land. The petitioner dismissed the protestor's claim that the land was held in trust for them by the deceased as a fallacy; there is no such trust on the subject land.

[5] At the time of the demise of the deceased's father the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> protestors that is Anastacia Kagete, Rose Kamenwa, Catherine Kinairi and Delfina Karee were all married and abstained from claiming from the estate of their deceased father. The 1<sup>st</sup> protestor, Daniel Muthuri, lives on the property bequeathed to him by their father. Thus, they have no claim in law, equity or trust to the estate of the deceased neither are they beneficiaries or dependants. But the petitioner concedes that the deceased held property in trust for his late brother Francis Kaura who at the time of their father's passing was a minor and as such the only person with a legitimate claim under trust to the estate of the deceased is Jerica Kaura. Her proposed mode of distribution of the subject estate is:

a) LR. NO. NYAKI/GIAKI/79

Jerica Kaura M'Munyua 2 Acres (0.809 HA)

Sarah Kinya Mwiraria 7.934 Acres (3.21HA)

#### **DETERMINATION**

[6] I have considered the entire record, affidavits and submissions of parties. The issue for determination is: ***how the estate of the deceased should be distributed.***

[7] The deceased was survived by his wife, the petitioner, and his children. This being the case, the guiding provision of the law would be Section 35 of the Law of Succession Act. The siblings of the deceased protested and claimed that they are entitled to a share of the estate on the basis of trust. As such, they asserted that their consent was necessary before filing of these proceedings- they were neither consulted nor their consent sought. In my considered view, claims of trust in land are substantive causes quite separate from succession causes and should be established by cogent evidence in the proper proceedings and forum for that purpose. I say so because the alleged trust will relate to the estate of the donor who is not the deceased to whose estate these proceedings relate. Again, the personal representative of the deceased trustee and the beneficiaries to the trust shall be the parties in such proceeding to determine the trust. A probate court should only give effect to a decision out of the suit filed specifically to determine the trust. I may be wrong, but, such question should be settled elsewhere and not in this cause especially in the face of the great contestation as I have seen among these parties. That notwithstanding, I do not find any proof of trust in favour of the protestors apart from Francis Kaura who is said to have been a minor and his share in the estate property was left with the deceased. This fact was even admitted by the petitioner. Therefore, I dismiss the protest for lack of proof except I will make provision for family of the late Francis Kaura. It is worth noting that it was said that Daniel Muthuri Munyua who is the eldest brother, was living on a property that was bequeathed to him by his father. He did not categorically refute this claim or address it comprehensively despite the fact that he was making a claim on his father's land. This is an important aspect of the law of inheritance; as I have stated before, such bequests are taken into account under section 42 of the Law of Succession Act in determining the ultimate entitlement of the beneficiary. Parties should therefore know that they will not be allowed double portion in the estate if they were given specific benefits by the deceased during his lifetime.

#### **Fairness matters**

[8] Having come to the foregoing conclusion, the only persons who are entitled to the estate are the family of the deceased and late Francis Kaura. I note that the Petitioner has allotted herself a bigger share of the estate than the family of the late Francis Kaura without giving a basis for that kind of distribution. She admitted that the deceased held the land in trust for the late Francis Kaura but she did not provide details of the proportion of each beneficiary's entitlement in the estate. I have perused the affidavit sworn on 16<sup>th</sup> April 2016 by Jerica Kiende Kaura, the widow of the late Francis Kaura. She averred that the two families live on and shared the estate property on equal basis. She stated that they live on the estate property with all their children. She also deposed that the chief had noted that the two widows should apply for letters of administration jointly but the petitioner declined to sign papers. This evidence stands strong. Fairness matters. Accordingly, on the basis of the evidence on record and the law, the estate property should devolve to the two families equally. And under the principle of representation the portion due to each family shall devolve to the widow and her children equally. In the upshot, the estate shall be distributed as follows:

**LR. NO. NYAKI/GIAKI/79**

*a) Jerica Kaura M'Munyua.....one half of the property to hold on her own behalf and that of her children in equal shares*

*b) Sarah Kinya Mwiraria..... one half of the property to hold on her own behalf and that of her children in equal shares*

[9]This being a succession cause involving close family members, I order each party to bear own costs. It is so ordered.

**Dated, signed and delivered in open court at Meru this 30<sup>th</sup> day of July 2018**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

M/s. Okelo for Petitioner

Petitioner – present

Protestors in person - present

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**F. GIKONYO**

**JUDGE**