



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 523 OF 2012

IN THE MATTER OF ESTATE OF M'MUNGANIA

M'BAICHU alias M'MUNGANIA BAICHU - (DECEASED)

LEONARD KIRIMI MUNGANI.....PETITIONER

VERSUS

RAEL KATHAMBI.....PROTESTER

DAVID MUTEMBEI.....PROTESTER

RULING

The late M'Mungania Baich died on 20th November 1985 and was survived by 9 children namely:-

1. M'Rutere M'Mungania
2. M'Itonga
3. Eunice Kainda
4. Grace Kajuju
5. Rael Kathambi
6. D.K. M'Mungania
7. Leonard K. M'Mungania
8. David Mutembei
9. Florence Kanana

Leonard Kirimi Mungania cited Rael Kathambi and David Mutembei to take up grant or he be allowed to take up Letters of Administration. The property forming the net intestate estate is L.R. No. Ntima/Igoki/946. Grant was made on 15th Marchi 2013 to Leonard Kirimi Mungania.

When Leonard filed summons for confirmation of grant dated 7th day of October 2013, M'Rutere M'Mungania, M'Itonga M'Mungania and D.K.M Ringera M'Mungania consented to application for confirmation and mode of distribution. Leonard Kirimi proposed that the 1.62 Ha be shared equally amongst:-

- Leonard Kirimi
- M'Rutere M'Mungania

- M'Itonga M'Mungania
- D.K. Ringera
- David Mutembei

David Mutembei filed affidavit in protest to confirmation for reasons it was contrary to the wishes expressed by the deceased. David Mutembei averred that the deceased had prior to his death distributed the parcel of land in question to his sons who took actual possession and developed their respective portions which have distinct makings. The protester said he occupies 1.42 acres which was identified to him by the deceased he said he was entitled to a bigger share than his brothers because he took care of his father the deceased herein. David Mutembei claimed that distribution of the deceased persons land into equal shares will disturb the status quo and result in the altering of existing boundaries and the possibility of relocating permanent structures. He said even clan elders resolved that wishes of the deceased be maintained.

Leonard Kirimi said the deceased person gave his sons equal portions of land and remained with his portion. He admitted that the deceased persons sons took possession and developed their respective portions. That after the death of deceased the protester was permitted by the other sons to pick coffee from the deceased persons portion and it is not true the deceased gave him that portion. Leonard said that the deceased persons portion should be shared equally amongst the 5 sons as all of them took care of him and protester didn't give special care.

Rael Kathambi also swore an affidavit in support of protest and proposed estate to be distributed equally amongst the 6 surviving children of the deceased. Leonard Kirimi said 3 sisters from his mothers house were not claiming their interest in the estate because it was not his fathers wish and that Rael Kathambi got married in 1958 and he merely wants to delay the cause.

The protester produced minutes allegedly made in a meeting attended by 65 elders, 2 Assistant chiefs and 3 Area Mangers in which it was resolved that the deceased persons share of the estate should be given to Mutembei the Protester.

D.K. M'Ringera was also in support by his brother the Petitioner that the portion that deceased person occupied should be distributed to his 5 sons equally.

In his evidence the Protester admitted that by consent of his brothers he changed coffee accounts from his father's name to his name. In cross examination Protester admitted the deceased didn't leave a will in regard to the portion he was using. He said he planted trees which he had already cut.

Rael Kathambi said when petition was filed he was not involved. She said she didn't denounce her interests to the estate and she wants to be given her share of the estate. He said it is Protester, who had been losing portion of land that his father occupied. She said she was the only surviving sister. She said the deceased distributed land physically on the ground to his 5 sons in 1984. She said the portion in dispute is small and can't be shared by all the sons.

Assistant Chief for Gakoromone testified and confirmed he presided over clan meeting with family of the deceased as per minutes produced as EXP1. He said the deceased didn't leave a will to say how the portion he was residing on should be distributed. He said minutes of the meeting were not signed by members of family indicated as present. He said it is only the chair and secretary who signed the minutes. He said report of felling trees on disputed portions of land was made to him and he referred parties to the police. The petitioner testified and reiterated his averments in the affidavits he filed herein and his evidence as to mode of distribution and reasons thereto are D.K. N Ringera, brother to Petitioner and Protester testified in support of the petitioner.

At the conclusion of viva voce evidence the parties filed written submissions. From the evidence on record for the protester and the applicant as well as submissions it is apparent that although the deceased did not transfer land to his 5 sons he had physically identified to the portions of Ntima/Igoki/946 which each of them was to occupy and remained in possession of a 6th portion which the protester herein claims to have been wished by the deceased to go to him.

The protester counsel in submission admits rightly so that the only property remaining for distribution is the portion that the deceased occupied prior to his demise after the 5 sons received gift intervivos. Since there is neither oral nor written will and the 5 sons of the deceased already got portions of Ntima/Igoki/946, I would have had it devolved to Rael Kathambi the only surviving daughter of the deceased. Rael Kathambi is however of the opinion that, that portion should be shared equally amongst the surviving children of the deceased. If that will enhance harmony amongst the beneficiaries who are from the same father then be it.

The sons to the deceased will get portions earlier identified to them by the deceased as well as a portion that deceased occupied prior to his death but equal in portion to each other. No orders as to costs.

HON. A.ONG'INJO

JUDGE

RULING DELIVERED, SIGNED AND DATED THIS 2nd DAY OF AUGUST 2018.

IN THE PRESENCE OF:

C/A:- Penina

Petitioner: -MS Mwitaria Advocate holding brief for Muriuki Advocate for Petitioner

Protester:-Mr Muriithi for protester.

HON. A.ONG'INJO

JUDGE