



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 117 OF 2004

IN THE MATTER OF THE ESTATE OF MAGIRI KWAMBARA (DECEASED)

M'RINGERA M'MAGIRIPETITIONER

VERSUS

JENNIFER MWARIKIA M'INOTI

ELIZABETH KANGU M'INOTIPROTESTORS

JUDGMENT

[1] **MAGIRI KWAMBARA** ("the deceased") is the person to whose estate this Succession Cause relates. He died in 1963. According to the petition filed on 3rd June 2004, the deceased was survived by:

1. **M'Inoti M'Magiri** - Son (deceased)
2. **M'Kiruja M'Magiri** - Son
3. **M'Ringeera M'Magiri** - Son
4. **Wilson Mbobua M'Magiri** - Son
5. **George Kaaria M'Magiri** - Son

His assets listed are:-

- a. **L.R. NO. ABOTHUGUCHI /MARIENE/162** and
- b. **L.R. NO. ABOTHUGUCHI/MARIENE/300.**

The protest

[2] On 5th August, 2004 grant of letters of administration intestate were issued to M'Ringeera M'Magiri. The applicants filed an application to file an objection out of time dated 15th December 2004. On 2nd October, 2006 by consent, the application was marked withdrawn. On 26th October, 2006 the petitioner applied for confirmation of the grant of administration intestate but an affidavit of protest to the confirmation sworn by Gregory Gikunda on 22nd June 2007 was filed. He is the legal representative of the estate of M'Inoti M'Magiri, son of the deceased.

[3] He deposed that the deceased was the only sole proprietor of **LR. NO. ABOTHUGUCHI/MARIENE/300**. But, as for **LR NO. ABOTHUGUCHI/MARIENE/162**, he averred that four acres out of the said parcel were bought by his father M'Inoti Magiri which he fenced, built on and lived with them until his demise on 1969. He averred that during demarcation and consolidation, his father agreed with the deceased to have his portion and that of the deceased consolidated and registered together forming **LR NO. ABOTHUGUCHI/MARIENE/162**. According to the protestor, the petitioner is bent towards cleverly swallowing the estate of M'Inoti Magiri in the distribution the estate of the deceased. He concluded by saying that the said four acres are not subject to distribution in this cause. He stated, that, **LR. NO. ABOTHUGUCHI/MARIENE/300** should be divided equally among the five sons as on the ground each family lives on their own portion. He declared the distribution proposed in the summons to be unfair, unjust and inequitable and only meant to benefit a few at the expense of the other dependants.

Petitioner justified his proposal

[4] The petitioner vide a supplementary affidavit sworn by M'Ringera M'Magiri on 2nd July 2007 provided reasons for his proposal in the summons for confirmation of the grant. He proposed the estate to be distributed as follows:

L.R. NO. ABOTHUGUCHI/MARIENE/162

- a. Jacob M'Kiruja M'Magiri - 2.27 Acres**
- b. Wilson Mbobua M'Magiri - 1.94 Acres**
- c. Susan Tirindi Kaaria - 2.27 Acres**
- d. M'Inoti M'Magiri - 2.27 Acres**

L.R. NO. ABOTHUGUCHI/MARIENE/300

- a. M'Ringera M'Magiri - 2.27 Acres**
- b. Wilson Mbobua M'Magiri - 0.33 Acres**

Viva Voce Evidence

[5] On 14th June, 2016 it was directed that the protest be canvassed through *viva voce* evidence. **OB1 Gregory Gikunda** reiterated what he had earlier stated in his affidavits. He did not agree with the petitioner's mode of distribution for it does not cater for his father's 4 acres. In spite of the green card of parcel No. 300 being registered in the name of the deceased he ascertained that his father has 4 acres in the said land parcel. His evidence that his father owned 4 acres and the position on the ground and sketch he has filed proves this.

[6] The petitioner also gave a sworn testimony and called one witness. **PW1 Ringera M'Magiri** told the court that the estate of the deceased should be shared equally that is 2.27 Acres. He said that he has distributed the estate to the beneficiaries. He stated that it is not true that M'Inoti M'Magiri had 4 Acres in LR No. 162. He declared that the deceased is his father as he sired him. He argued that land parcel No. 162 and 300 should be divided in 5 portions. **PW2 Jacob M'Kiruja M'Magiri** corroborated what was stated by **PW1**.

Submissions

[7] The petitioner submitted that the deceased had other children namely: **Julia Karoki (deceased), Jennifer Nchurubi(deceased), Mukami Zipporah, Jacob Kiruja, Wilson Mbobua and George Kaaria (deceased)**. The trust claim by the protestor was never proved however that this court has no jurisdiction to determine issues of trust. On the issue of distribution, the estate should be distributed equally.

ANALYSIS AND DETERMINATION

[8] Distribution of the estate is the main issue in controversy. This court must ascertain the estate of the deceased, identify the beneficiaries and thereafter distribute the estate

Estate property

[9] **LR NO. ABOTHUGUCHI/MARIENE/300** and **LR NO. ABOTHUGUCHI/MARIENE/162** were listed as the properties constituting the estate of the deceased. However, the protestor claimed that his late father M'Inoti M'Magiri bought 4 Acres which during demarcation and consolidation was consolidated and registered with the deceased's portion to form LR NO. Abothuguchi/Mariene/162. This kind of claim requires succinct evidence and before the right forum.

[10] The foregoing notwithstanding, according to the district surveyor's report dated 15th October 2007 who visited land parcel No. 162 he stated that there were no permanent boundaries markings showing the way each beneficiary has been using the land. But, the approximate areas cultivated by the beneficiaries are as follows:

- 1. Jacob M'Kirija M'Magiri - 1.42 Acres
- 2. Wilson Mbobua M'Magiri - 0.92 Acres
- 3. Susan Tirindi Kaaria - 0.70 Acres
- 4. M'Inoti M'Magiri - 2.80 Acres
- 5. M'Ringera M'Magiri - 0.35 Acres

[11] The green card produced shows that the said land parcel is registered under the name of the deceased. The protestor stated that evidence

that his father owns 4 acres out of the said land parcel is based on the position on the ground. Having a look at what was reported by the district surveyor and what is alleged by the protestor, it does not tally. It is clear that the land parcel is occupied by other beneficiaries apart from him. Also, the area occupied by the M'Inoti M'Magiri family does not total to 4 Acres. Consequently I find that the whole of LR No. Abothuguchi/Mariene/162 belongs to the estate of the deceased.

Beneficiaries

[12] The second issue to establish is who the beneficiaries are. Both parties are in agreement that the deceased had five sons: **M'Inoti M'Magiri, Jacob M'Kiruja M'Magiri, M'Ringeera M'Magiri, Wilson Mbobua M'Magiri and George Kaaria M'Magiri**. In the petitioner's submissions he argued that the deceased had other children namely: **Julia Karoki (deceased), Jenniffer Nchurubi (deceased) and Mukami Zipporah**. The law is quite clear that the estate of the deceased ought to be distributed amongst all his children whether a son or daughter. No one ought to be discriminated as stipulated by the law under Article 27 and 60 of the Constitution, which is the supreme law of the land. But I am perturbed by the fact that the petitioner never brought the issue of other children of the deceased to the attention of the court. The living daughter or representatives of the estate of deceased daughters never featured prominently and no representation thereof was made on willingness to take a share or renunciation of right in the estate. I am therefore not in a position to make anything meaningful about the daughters or their families. The less I say about that issue the better.

Equal sharing

[13] The above aside, the deceased has left behind children and no surviving spouse. The guiding provision of the law is Section 38 of the Law of Succession Act which states:

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

[14] Applying this law, I direct that the estate of the deceased shall be divided equally amongst the following children of the deceased:-

1. **M'Inoti M'Magiri,**
2. **Jacob M'Kiruja M'Magiri,**
3. **M'Ringeera M'Magiri,**
4. **Wilson Mbobua M'Magiri and**
5. **George Kaaria M'Magiri**

[15] But, I am aware that some beneficiaries take under the doctrine of representation of deceased beneficiaries. I am also alive to the fact that the lands have not been amalgamated. Therefore, I find the proposal by the Petitioner to be most fair and in line with the principle of equality in section 38 of the Act. Accordingly, I order distribution of the estate to be as follows:

L.R. NO. ABOTHUGUCHI/MARIENE/162

- e. **Jacob M'Kiruja M'Magiri - 2.27 Acres**
- f. **Wilson Mbobua M'Magiri - 1.94 Acres**
- g. **Susan Tirindi Kaaria - 2.27 Acres**
- h. **M'Inoti M'Magiri - 2.27 Acres**

L.R. NO. ABOTHUGUCHI/MARIENE/300

- c. **M'Ringer M'Magiri - 2.27 Acres**
- d. **Wilson Mbobua M'Magiri - 0.33Acres**

[16] The grant herein is confirmed in the foregoing terms.

Dated, signed and delivered in open court at Meru this 30th day of October, 2018

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F. GIKONYO

JUDGE

In the presence of:

Mungai for Mwanzia for protestor

Kithinji for Kariuki for Petitioner

COURT

Judgment delivered in open court. Matter finalized.

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F. GIKONYO

JUDGE