



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 253 OF 1995

IN THE MATTER OF THE ESTATE OF TUERANDU MUNGANIA (DECEASED)

AJELICA MWARANIA M'TWERANDU.....1ST APPLICANT

GODFREY MUNENE M'TWERANDU.....2ND APPLICANT

-V-

SAMSON KINYUA.....1ST PROTESTOR

ALEX KIGUNDA MUGUNA.....2ND PROTESTOR

STEPHEN NDEREBA.....3RD PROTESTOR

RULING

1. This Succession Cause relates to the estate of **Tuerandu Mungania** (“the deceased”) who died on 8th September, 1983. The deceased left behind the following survivors: -

- a) **Janet Mukiri M'Tuerandu** - **Widow**
- b) **Ajelica Mwarania M'Tuerandu** - **Widow**
- c) **Monicah Kinaitore Kinoti** - **Daughter**
- d) **Venedicta Gatwiri** - “
- e) **Florence Gakii Ayub** - “
- f) **Julia Mucece** - “
- g) **Rebecca Mukomunene** - “
- h) **Isabella Kaimuri Kirimi** - “
- i) **Lucy Rigiri Mutua** - “
- j) **Agnes Mwaregoki** - “
- k) **Godfrey Munene M'Tuerandu** - **Son**
- l) **Geoffrey James Gatobu** - “
- m) **Richard Kithinji** - “
- n) **Samson Kinyua** - “

- o) Alex Kigunda Muguna - “
- p) Stephen Ndereba - “
- q) Samuel Kaimenyi - “
- r) Gitonga Brian - “
- s) Gerald Murwerwa - (DECEASED)
- t) Washington Ndiira Mbijiwe - Son
- u) John Ndubi - “
- v) Harun Kathurima - “

2. The deceased left **LAND PARCEL NO. KIIRUA/NAARI/568** as the only asset of the estate. The grant was issued to Janet Mukiri M’Tuerandu on 17th October, 1996. She later died and on 4th June, 2018, **Ajelica Mwarania M’Tuerandu, Godfrey Munene M’Tuerandu and Samson Kinyua** were appointed the administrators of the estate of the deceased.

3. By Summons for Confirmation of Grant dated 7th June 2018, **Ajelica Mwarania and Godfrey Munene** sought to distribute the estate of the deceased as follows: -

LAND PARCEL NO. KIIRUA/NAARI/568 (16.2 Acres)

- a) Ajelica Mwarania M’Twerandu - 0.45 Acres
- b) Godfrey Munene M’Twerandu - 3.53 Acres
- c) Geoffrey James Gatobu - 1.35 Acres
- d) Geoffrey James Gatobu - 0.50 Acres
- e) Geoffrey James Gatobu - 0.48 Acres
- f) Godfrey Munene M’Twerandu - 2.52 Acres
- g) Alex Kigunda Muguna - 1.34 Acres
- h) Stephen Ndereba - 1.10 Acres
- i) Samuel Kaimenyi - 0.71 Acres
- j) Estate of Gerald Murerwa
(deceased represented by
Gitonga Brian, Linet Karwitha
and Kelvin Muriuki - 0.86 Acres
- k) Washington Ndiira Mbijiwe - 1.15 Acres
- l) John Ndubi - 0.98 Acres
- m) Harun Kathurima - 0.98 Acres

4. The 1st protestor filed a protest on 13th June 2018, contending that the deceased left behind three widows. That the deceased had not distributed his assets to the beneficiaries before his demise and that in the proposed distribution, the applicants had omitted him yet he was the 1st born in his mother’s house.

5. The protest was heard through viva voce evidence. The parties and their witnesses filed their witness statements on which they were cross-examined. **PW1 was Samson Kinyua**, the 1st protestor while **PW2 was Stephen Ndereba**. They adopted their witness statements and testified that the deceased had 3 houses represented by his three wives, namely; **Janet Mukiri (deceased), Hellen Kathure (deceased)** and

Angelica Mwarania. That the 1st house had 4 children, while the 2nd house had 6 children with the 3rd house having 9 children.

6. They further testified that the deceased had never distributed his land before his demise and that they lived on the land which they had developed. That the proposed distribution was unfair as it left some of the beneficiaries out. They therefore proposed that the estate be distributed equally between the sons who should get 1 ¼ acres with the balance being shared equally to the surviving widow and all daughters.

7. **RW1 Ajelica Mwarania** adopted her witness statement and testified that prior to his death, the deceased had divided his land into 4 portions. He gave his 3 wives three of those portions to hold on behalf of their respective households while he retained 1 portion for himself. It was her further evidence that their boundaries and a road of access created to demarcate the three portions of land.

8. She contended that the proposed distribution was as per the shares held and utilized by the beneficiaries from their respective households and that each beneficiary had developed his/her respective portion and that the internal boundaries kept as were fixed during the lifetime of the deceased.

9. She further told the court that **Godfrey Munene M'Twerandu** was given by the deceased the portion which the deceased had retained for himself because of the role he had played in the life of her late husband and his children

10. **RW2 Godfrey Munene M'Twerandu** told the court that, prior to his demise, the deceased had divided his Land into 4 portions 3 of which he gave his wives to hold on behalf of their respective households while he retained 1 portion for himself. It was his further evidence that the deceased had indicated his wishes to his neighbours and relatives as to how he intended that land to be held. That thereafter, every household shared the land to members of its household amongst themselves.

11. He further testified that, after education and employment, he took the role of educating his brothers and sisters on behalf of his father. That for this reason, the deceased gave him the portion that he had retained for himself in addition to the share that he got from his mother's household.

12. **RW 3 was Jeremiah M' Ringera.** It was his evidence that the deceased called 6 elders being: Mwenda (deceased), M'Itaru, Gedion, M'Muthuri and himself and divided his land into four portions. That he gave each wife with her household a portion and retained one for himself which he later gave to **RW2.**

13. **RW4 Francis M' Mugambi** reiterated what **RW1, RW2 and RW3** had told the court.

14. It was submitted for the applicants that since the deceased had distributed his property before his demise and in view of the fact that each child was to get property from his or her mother, the proposed distribution was in accordance with the wishes of the deceased whereby each beneficiary is to be provided for from the share of their mother. The protesters did not file any submissions.

14. I have carefully considered the affidavits on record, the testimonies of the witnesses and the submissions of counsel for the applicants. The issues for determination are; ***did the deceased divide his property before his demise, if so, how? If not, how should the estate be distributed?***

15. The contention by the applicants was that, prior to his death, the deceased had divided his land into 4 portions. That he had given to his 3 wives a portion each while he retained a portion for himself which he later gave to Godfrey Munene because of what he had done to the family. That each wife was expected to share the portion given to her with her household. That the proposed distribution was in accordance with the wishes of the deceased.

16. This was strenuously denied by the protesters. One thing that was not in dispute is that the daughters of the deceased are excluded from the proposed distribution. They all signed the consent to distribution which had excluded them from the distribution. This to my mind amounted to an express renunciation of their interest in the estate.

17. The evidence on record shows that after the deceased migrated from Thimbiri to Naari, the present estate property, he settled his 3 wives on different definite portions within the estate land. The three wives were to cultivate and use their designated portions with their respective children. The said wives took possession thereof and continued to use the same during the lifetime of the deceased. These are the portions the applicants stated the children of the respective wives had occupied and are the shares the applicants have proposed to distribute to them.

18. One of the portions which the deceased parceled out was for and by his own use until he died. It is the one which the 2nd applicant contended was bequeathed to him by the deceased for the 'good' things he had done for the family.

19. When questioned how the deceased allegedly shared or divided his land, the applicants and their witnesses only stated that the deceased showed or marked on the ground the respective shares for the 3 wives. They were also not able to state with exactitude the area covered by the portion the deceased occupied and which he allegedly later gave to the 2nd applicant.

20. It is clear that during his lifetime, the deceased showed his respective wives specified areas where they were to cultivate and fend their respective families. Did this amount to the deceased sharing or dividing his land during his lifetime? Can that be assumed to be a bequest which survived him?

21. A property of a deceased is either willed away during lifetime or inherited under the intestacy rules in force after his demise. The date when the deceased divided his land was not given. The specific areas allegedly shared to the wives was also not disclosed. All the applicant told the court is that the deceased divided his land into 4 portions out of which, he distributed 3 to his 3 wives for use together with their

respective children and he kept one portion for himself.

22. To my mind, that cannot be a specific bequest. There was no evidence that he intended to disinherit his children. If his intention was that those portions belong to his wives absolutely to the exclusion of his children, nothing would have been easier than for him to state so in three ways: -

- a) through a written will,
- b) procuring separate titles for the said portions in the names of his 3 wives, or
- c) calling all his children and elders on a specific date, and declaring before all and sundry that, the portions given to the wives belonged to them absolutely and thereafter take positive steps to dispose of the same to them under section 31 of the Act.

23. One thing that is clear from the proposed distribution is that the 2nd applicant is proposed to get 6.05 acres. His brother Geoffrey James Gatobu is to get 2.33 acres. The two are to get 8.38 acres leaving the balance of 7.82 acres to be divided amongst the 7 remaining brothers and the surviving widow. From the proposed distribution Samuel Kaimenyi, also a son of the deceased is earmarked for 0.71 acres. The question is, was that the intention of the deceased? I do not think so.

24. In my view, what happened is that, being a polygamist, the deceased knew that the three wives could not live together and use his entire property peaceably for the benefit of his entire family. He therefore settled each wife on her own separate portion to fend for her children leaving a portion for himself. In the meantime, the entire property remained under one title, in his name. This was when he migrated from Thimbiri to Naari and the same state of affairs remained as such until he died in September, 1983. There is no evidence that he divided any portion of his land to any of his children. He left it in the custody and possession of his wives who were cultivating the same for their own and for the benefit of their respective children.

25. Having failed to do either of the three dispossessory acts set out in paragraph 22, above the property remained to be that of the deceased and he died before he could distribute it to all or any of his beneficiaries in any manner known in law. He therefore died intestate and his property is to be inherited under the intestacy Rules.

26. The other issue is the 4th portion which the deceased is said to have kept for himself. The applicants alleged that the deceased gave it to the 2nd applicant. There was however, no evidence to show what size that portion was, the date when he allegedly gave it to the 2nd applicant or that the circumstances under which he gave it to the applicant amounted to an express bequest. That evidence lacking, I hold that the interest in that property merged with the rest of the deceased's property upon his demise.

27. The deceased having been a polygamist and having died intestate, his estate is to be distributed in accordance with **Section 40 of the Law of Succession Act** which provides to the effect that the estate is to be distributed equally among all units with the widow making a unit of her own.

28. Accordingly, the estate will be distributed as follows:-

LAND PARCEL NO.KIIRUA/NAARI/568 (16.2 Acres)

- a) **Ajelica Mwarania M'Iwerandu** - **1.6 Acres**
- b) **Godfrey Munene M'Twerandu** - **1.6 Acres**
- c) **Geoffrey James Gatobu** - **1.6 Acres**
- d) **Alex Kigunda Muguna** - **1.6 Acres**
- e) **Stephen Ndereba** - **1.6 Acres**
- f) **Samuel Kaimenyi** - **1.6 Acres**
- g) **Estate of Gerald Murerwa**
(deceased represented by
Gitonga Brian, Linet Karwitha
and Kelvin Muriuki - **1.6 Acres**
- h) **Washington Ndiira Mbijiwe** - **1.6 Acres**
- i) **John Ndubi** - **1.6 Acres**

j) Harun Kathurima - 1.6 Acres

29. This being a family matter, I will order no costs.

DATED and **DELIVERED** at Meru this 29th day of November, 2018.

A. MABEYA

JUDGE