



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**SUCCESSION CAUSE NO. 683 OF 2015**

**(FORMERLY EMBU HIGH COURT SUCCESSION CAUSE NO.490 OF 2010)**

**IN THE MATTER OF THE ESTATE OF M'RINJEU MUTHARA alias ISAAC NJEU MUTHARA - (DECEASED)**

**AND**

**CAROLINE KAARI MUTEGLI.....1<sup>ST</sup> ADMINISTRATOR/APPLICANT**

**VERSUS**

**ROSE MUTHONI.....2<sup>ND</sup> ADMINISTRATOR/PROTESTOR**

**HUMPREY MUTWIRI MICHENI.....2<sup>ND</sup> PROTESTOR**

**J U D G M E N T**

1. This cause relates to the estate of the late **M'Rinjeu Muthara** alias **Isaac Njeu Muthara** who died on an unspecified date in September, 2006. According to the petition for letters of administration filed herein, the deceased died intestate leaving behind the following dependants namely:-

- (i) Caroline Kaari Mutegi
- (ii) Eliphias Micheni Njeu (deceased) and
- (iii) Margery Ciagitari Mbaka

The estate of the deceased comprises those properties known as Karingani/Mugirirwa/239 and Plot 22 Kiereni Market.

2. Caroline Kaari Mutegi and Rose Muthoni Eliphias were appointed joint administrators of the estate of the deceased herein on the 14<sup>th</sup> May 2018 and vide Summons for Confirmation of Grant dated 16<sup>th</sup> May, 2018, Caroline Kaari Mutegi, the 1<sup>st</sup> administratrix herein applied for confirmation of grant pursuant to the leave granted by this court to the administrators to apply for confirmation of grant before expiry of the 6 months- statutory period.

3. In her Supporting Affidavit the 1<sup>st</sup> administratrix/applicant gave the following list of beneficiaries namely:-

(i) Patrick Mutegi Isaack - A deceased son who left behind:-

- a. Caroline Kaari Mutegi - wife
- b. Benard Njagi Mutegi
- c. Betty Gatwiri Mutegi
- d. Rose Gakii Mutegi

(ii) Eliphias Micheni Njeu- A deceased son who left behind:-

- a. Rose Muthoni Eliphas
- b. Adrine Micheni
- c. Humprey Mutwiri Micheni
- d. David Kirimi Micheni
- e. Joy Wanja Micheni
- f. Zippy Gacheri Micheni
- g. Morris Mawira Micheni

(iii) Benson Mati Njeu -A deceased son who left behind:-

- a. Maggery Ciagitari Mbaka - wife
- b. Jackline Muthoni Mati
- c. Isaack Kimathi Mati

4. The applicant has proposed to have the estate distributed as follows:-

(A) **L.R. No. Karingani/Mugirirwa/239**

- (i) Caroline Kaari Mutegi - 0.5 ha
- (ii) Rose Muthoni Eliphas - 0.5 ha
- (iii) Margery Ciagitari Mbaka - 0.5 ha

(B) **Plot No. 22 Kiereni Market**

- (i) Caroline Kaari Mutegi
- (ii) Rose Muthoni Eliphas - equal share
- (iii) Margery Ciagitari Mbaka

5. The 2<sup>nd</sup> administratrix, Rose Muthoni Eliphas was dissatisfied with the above proposal and filed an affidavit of protest sworn on 5<sup>th</sup> June 2018. Her main bone of contention is that her son, Humprey Mutwiri Micheni had been given 0.93 acres by deceased as a gift during his lifetime and that the deceased had divided his land into 4 portions of 0.93 acres each and gave each of his sons (now deceased) a portion.

6. The 2<sup>nd</sup> administratrix has further protested to the estate being divided into 3 stating that a curse is likely to befall on them if the wishes of deceased are not respected and according to her the wishes of the deceased was to have the estate divided into 4 portions with each of his 3 sons getting a portion and Humphrey Mutwiri getting a portion as well. She has further deposed that Plot No. 22 Kiereni market had been given to her by late husband.

7. Humphrey Mutwiri Micheni also filed an affidavit in support of his mother's proposal and added that the applicant's proposal will have undesired effect of evicting them from where he is currently occupying in the estate. He has reiterated the protestor's proposal that the estate should be distributed as per the wishes of the deceased.

8. This court heard the parties orally in regard to their respective positions about the distribution of the estate herein. The applicant on her part reiterated that that her proposal was equitable to all the beneficiaries and denied the suggestion that the deceased had formally subdivided his estate during his lifetime. She told that court that when the deceased died, Humphrey Mutwiri moved into his house and occupied it and continued ploughing where the deceased used to plough. According to her Humphrey Mutwiri moved in and took occupation of the deceased's house after being prompted to do so by his late father- Eliphas Micheni.

9. Festus Njoki Njuki (PW2) testified on behalf of the 1<sup>st</sup> administrator and told this court that the deceased had 3 sons namely:-

- (i) Patrick Mutegi Njeu

(ii) Eliphas Micheni Njeu &

(iii) Benson Mati Njeu.

He added that all the three sons are now deceased but left behind wives and children as named by the applicant herein. He supported the applicant in her claim that the deceased had not subdivided his estate prior to his demise. According to him all the deceased did was to show each son where to plough. He further added that when the deceased died Eliphas Micheni took his son Humphrey to go and occupy a house that the deceased had left behind.

10. Rose Muthoni Eliphas (DW1) the protestor herein testified and reiterated the contents of her affidavit. According to her there was a clan meeting prior to the demise of the deceased when her late husband (Eliphas Micheni) demanded to be given a share of land because he was an adult aged 40 years and that it was at that clan meeting that he deceased divided his estate into 4 portions and took Humphrey Mutwiri to stay with him because he was old.

11. Humphrey Mutwiri (PW2) also testified and supported her mother's position on the distribution of the estate. He further added that he used to stay with his grandfather (deceased herein) and assisted him in picking tea and coffee. He further told this court that in 2004, the deceased called some unidentified old men and told them that he was giving a share of his land to him (Humphrey Mutwiri). His evidence was supported by Elias Mbaka (DW3) who told this court that he was the chairman of Mbuba clan where the deceased belonged. He further stated that the deceased called them sometime in 1999 and told them that he wanted to subdivide his land into 4 portions and gave a portion to Humphrey Mutwiri. When pressed under cross-examination however he conceded that in 1999, he was young and only assumed the chairmanship of the clan in 2017. He further stated that the clan men who attended the meeting was ten thousand and that the minutes of the meeting was with the clan Secretary.

12. This court has considered both the applicant's proposal and the proposal of the protestor. I have considered the evidence tendered in support of the respective proposal. At the heart of the dispute herein, is whether the deceased died intestate or left a will or made his intentions known on how his property should be distributed.

13. There is no dispute that the deceased died leaving behind 3 sons who have all died. All the parties in this cause are in agreement that the 3 deceased sons left behind their respected wives and children. There is no dispute that the list given by the applicant under paragraph 2 of her Supporting Affidavit in support of confirmation is the correct position. There is no dispute as to what properties were left behind by the deceased. The assets comprising the estate are:-

(i) Karingani/Mugirirwa/239 and

(ii) Plot No. 22 Kiereni Market.

The above properties comprises the net estate and what is available for distribution.

14. The question posed in this cause is whether the deceased died intestate or testate. The answer to this question is quite apparent from the petition filed and affidavits filed by the parties in this cause. The deceased died intestate. There was no will tendered in evidence to prove that he had left a will or that he had indicated how he wanted his estate distributed. This court saw and listened to the evidence given by Elias Mbaka and from his evidence it is clear that he had nothing tangible to offer in support of the protestor's position that the deceased had subdivided his estate into 4 portions and gave a portion to his grandson- Humphrey Mutwiri. He conceded that in 1999 when the deceased purportedly divided his estate he was young and the person taking minutes was clan Secretary. That clan Secretary was not called to give or tender any evidence whether oral or documentary to support the claims made by the protestor and his son (Humphrey Mutwiri.)

15. I am also not persuaded by the protestor's claim that the deceased did give Plot No.22 at Kiereni Market to her late husband Eliphas Micheni or anyone for that matter. There was no evidence tendered to prove such allegations.

16. This court finds that on a balance of probabilities the protestor has failed to prove her case. The deceased herein died intestate and his estate should be divided in accordance with **Section 38 of the Law of Succession Act**, which provides that the estate should be divided equally among the surviving children. In this cause all the three sons of the deceased who survived him are now all deceased. They however left behind widows and children as follows:-

(A) Patrick Mutegi Isaac deceased son left behind Caroline Kaari Mutegi, Benard Njagi Mutegi, Betty Gatwiri and Rose Gakii Mutegi.

(B) Eliphas Micheni Njeu deceased son left behind Rose Muthoni Eliphas, Adrine Kageni, Humphrey Mutwiri Micheni, David Karimi, Joy Wanja Micheni, Zippy Gacheri Micheni and Morris Mawira Micheni.

(C) Benson Mati Njeu deceased son left behind Maggery Ciagitari Mbaka, Jackline Muthoni Mati and Isaack Kimathi Mati.

The protestor's proposal is both untenable in law and discriminatory as it seeks to favour one of the deceased son the late Eliphas Micheni against the other deceased sons. That is against the law and cannot be sustained.

13. The proposal made by the 1<sup>st</sup> administratrix is lawful and equitable to all the beneficiaries in this cause as the law as I have observed above provide for equal distribution. In the premises the grant issued on 14<sup>th</sup> May 2018 is hereby confirmed in terms of paragraph 4 of the affidavit in support sworn by Caroline Kaari Mutegi on 16<sup>th</sup> May 2018. I shall make no order as to costs for now as the matter involves

family members. So each party shall bear own costs.

**Dated, signed and delivered at Chuka this 18<sup>th</sup> day of December, 2018.**

**R.K. LIMO**

**JUDGE**

**18/12/2018**

Judgment signed, dated and delivered in presence of Mugo for petitioner and Kijaru for protestors.

**R.K. LIMO**

**JUDGE**

**18/12/2018**