



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

SUCCESSION CAUSE NO. 220 OF 2011

In the matter of the Estate of M'Mutungi M'Raibuni

MARTIN GITONGA.....PETITIONER

VERSUS

MARION K, M'MUTUNGI.....1ST INTERESTED PARTY

PETER M. M'MUTUGI.....2ND INTERESTED PARTY

JUDGMENT

[1] M'Mutungi M'Raibuni died intestate on 22nd July 1995. On 8th April 2011, the chief Kithoka location wrote an introduction stating the dependants of the deceased. On 12th April 2011 Martin Gitonga petitioned for letters of administration citing KITHOKA/ NYAKI/1306 as the only asset of the deceased. He included the following as the dependants herein;

- a. Zipporah Nkirote -wife (deceased)
- b. Gladys Mbirine -wife (deceased)
- c. MarionKagutu - wife
- d. Maria Nkou - daughter
- e. Lucy Kaniu - daughter
- f. Julius Mupungi - son
- g. Peter Mutonya - son
- h. LK - daughter
- i. Sarah Mukauthene - Married Daughter
- j. John Kambuthu - son (deceased)
- k. Tabitha Taru - Daughter Married
- l. Martin Gitonga - son
- m. Nicholas Kirinya - son

[2] On 11th August 2011, Marion Kagutu M'Mutugi and Peter Mutonya M'Mutugi applied for revocation/annulment of grant on the grounds that the deceased had two wives and children as follows;

FIRST HOUSE- ZIPPORAH KIORE M'MUTUNGI (DECEASED)

- I. ELIZABETH KARUGA -DAUGHTER (DECEASED)
- II. MARIA NKOU -DAUGHTER
- III. SABERA KAGONA -DAUGHTER
- IV. JOHN KAUMBUTHU -SON (DECEASED)
- V. PETER MUTONYA M'MUTUNGI -SON

SECOND HOUSE – MARION KAGUTU M'MUTUGI

- I. LUCY KANIU -DAUGHTER
- II. JULIUS WANGUA -SON
- III. SARAH MUKAUTHERE -DAUGHTER
- IV. ESTHER KABIRA -DAUGHTER
- V. LK -ADOPTED DAUGHTER

[3] The objectors stated that the petitioner herein is the son of LK and therefore a stranger to the estate of the deceased. They contended that according to Meru custom the petitioner is from another clan. They argued that the intention of the petitioner is to steal land from the rightful beneficiaries. According to the objectors the petitioner forged signatures of the beneficiaries and it was clear that the petitioner had filed this petition secretly and fraudulently.

[4] In his replying affidavit dated 30th September 2011, the petitioner claimed that the said LK was not an adopted daughter of the deceased but the real daughter of the third wife. He is a grandson of the deceased and therefore not a stranger in this cause. He also stated that the 2nd interested party was given NYAKI/KATHOKA/1305 by the deceased during his lifetime. The family convened a meeting before the chief to discuss issues relating to this estate and the 2nd wife, expressed the wish of the deceased during that meeting and indicated that as a grandson he was entitled to file this suit.

[5] The objection was heard vide *viva voce* evidence. PW1 **MARION KABUTU M'MUTUNGI** told the court that the deceased has 2 wives, herself and Nkirote (deceased). LKM is her adopted daughter whose real mother, then married to the deceased left her when she was six months after which she raised her as her own. That the petitioner is LK's son and can only claim on his mother's share. She has proposed that the petitioners mother takes ½ an acre from NYAKI/KITHOKA/306. In October 1998, the family met to discuss filing of a succession cause for the deceased where minutes were taken. She recalled that they were three in the meeting. Peter Mutonya has his own separate title which he was given by his grandfather and therefore he is entitled to his father's land. She added that she did not evict LK from the deceased land, as she got married and moved in with her husband.

[6] **PW2 PETER MUTONYA M'MUTUGI** told the court that the petitioner's mother is alive and is currently living with her husband. He stated that the petitioner is the son of his sister. LK was raised by their mother and she had children before she got married. He stated further that he has land that is 8 acres, given to him by the deceased when he was a young person. The 8 acres came from demarcation and did not have an owner. He went on to state further that, LK had already been included as a beneficiary to the estate of the deceased where the 1st interested party proposed to give her ½ an acre from NYAKI/KITHIKA/1306.

[7] **PW3 HENRY KATHIGAUTI** told the court that he is the petitioner's neighbor and knows him as a grandson of the deceased. He believes that the wife and children have priority to the estate than the petitioner.

[8] **PW4 SAMUEL M'NJOGU** told the court that the petitioner is the grandchild of the deceased and he should claim his share from his mother.

[9] **OW1 LYDIA KAINDA** told the court that she knows Marion Kagutu as the only surviving widow of the deceased who brought her up. She is the daughter of the deceased and Gladys Mbirine. In her statement, she said that the deceased left a wish that her children should be provided for. The petitioner, her son is the one who filed this cause. He used to live in the house of the deceased but the objectors pulled it down.

[10] **OW2 MWENDA M'RIMBERIA** who is a cousin to all the beneficiaries told the court in his statement that the deceased who was an assistant chief at Chugu/Munithu lived with his 1st and 2nd wife at the camp before his 3rd wife. He moved his 3rd wife Gladys Mbirine from the camp and took her to the land at Kithoka where she was the first wife to settle. The deceased before his demise made a wish before his 1st and 2nd wife and some elders that the 3rd house should be provided for. Later, on 1st October 1998 the family members held a meeting which he was present, the area chief was also invited to discuss over Land Parcel NYAKI/KITHOKA/1306. During the said meeting it was confirmed as per the wish of the deceased that the grandsons of the 3rd house be given a portion of the said land.

ANALYSIS AND DETERMINATION

[11] I have carefully considered the record and the testimony of the witnesses. The issues for determination are;

I. Whether the petitioner is a stranger in the estate or a beneficiary?

II. Whether the deceased provided for Peter Mutonya in his lifetime by giving him land parcel number NYAKI/KITHOKA/1305?

III. How should the estate of the deceased be distributed?

Whether petitioner is a stranger

[12] The sure guide on this question is section 66 of the Law of Succession Act cap 160 of the Laws of Kenya that provides;

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

[13] According to the above provision it is clear that priority is given to the surviving spouse of the deceased to apply for grant of letters of administration. Therefore the petitioner, in this case being the grandson of the deceased does not have priority over the wife and children of the deceased.

Whether petitioner is a beneficiary

[14] Faced with almost similar situation, Musyoka J. in the Estates of John Musombayi Katumanga – (deceased) [2014] eKLR rendered himself as follows:

“.....I suspect that she is a daughter to the said heir, and therefore a granddaughter of the deceased. She is described in one of the papers as a dependant of the deceased. The said Laura Mesitsa is not entitled to a share in the estate of the deceased there are two reasons for this. She is not an heir of the deceased for grandchildren are not entitled to inherit from their grandparents so long as their own parents, the children of the deceased, are alive and themselves taking a share in the estate. Secondly, she is not a dependant of the estate. She did not apply, as she should have, for provision under Section 26 of the Act, and there is no court order making her a dependant of the deceased. Under Section 29 of the Act, a grandchild can be a dependant of her grandparent but for her to qualify as such she must demonstrate to the court in an application properly brought under Section 26 of the Act that she was dependant on the grandparent immediately before his death.”

[15] In this case the petitioner has not yet demonstrated to the court that he was a dependant of the deceased. Therefore, the petitioner cannot be a beneficiary of the deceased especially also because his mother, the daughter of the deceased is still alive.

Distribution

[16] A proposal on distribution by LK dated 30th October 2013 indicated that the deceased was the original owner of Land parcel No. NYAKI/KITHOKA/387 which the deceased subdivided into two parcels NYAKI/KITHOKA/ 1305 and 1306. The 2nd interested party alone benefited from NYAKI/KITHOKA/1305 as it was transferred in his name. When a claim for gift inter vivos is made, it is only for purposes of bringing such property into account in determining the share of the net intestate estate finally accruing to the beneficiary that benefited from the gift from the deceased. See Section 28 of the Law of Succession Act which provides for Circumstances to be taken into account by court in making order:-

“In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

(a) the nature and amount of the deceased’s property;

(b) any past, present or future capital or income from any source of the defendant;

(c) the existing and future means and needs of the dependant;

(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;

(e) the conduct of the dependant in relation to the deceased;

(f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

(g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant."

See also section 42 which provides as follows

42. Previous benefits to be brought into account Where—

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

[18] According, to the 2nd interested party during his testimony, the deceased had 24 acres, he sold 8 acres, kept 8 acres and 8 acres was given to him. This is an admission by the 2nd interested party that the deceased transferred part of his property to the 2nd interested party therefore making a gift inter vivos. This gift shall be taken into account.

Deceased was polygamous

[19] The deceased was polygamous. Distribution shall therefore be guided by Section 40 (1) of the Law of Succession Act that provides;

"Where intestate was polygamous

1. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children."

[20] The interested parties in their submissions proposed NYAKI/KITHOKA/ 1306 to be distributed as follows;

1. Julius ManguaMutungi - 1 ¼ acres
2. Philis Wamaitha Kaumbuthu - 2 acres
3. Peter Mutugi - ½ acre
4. Sarah Mukauthene - ½ acre
5. Zakary Kairema - ½ acre
6. Sammy MutwiriGichune - ¾ acre
7. LKM - ½ acre
8. MarionNkouM'Mukira - ½ acre
9. Tabitha TaaruMutungi - ½ acres
10. Lucy Kaniu - ½ acres

[21] However, in the submission for the 3rd house, it was argued that interested parties left out Esther Kabira (daughter), Kagona Sabera (daughter), Martin Gitonga (grandson) and Nicholas Kiriinya (grandson). It was hypocritical of them to include 2 strangers Zakary Karema and Sammy Mutwiri Gichune. It is clear therefore, that the parties in this cause are unable to agree on distribution.

[22] From the foregoing I find that the revocation of grant to be valid and merited. The grant issued to the petitioner is revoked. Consequently, I order as follows;

1. That Marion Kagutu is hereby appointed as the administrator of the estate of the deceased. A grant shall be accordingly issued to her. The grant is also confirmed on the terms below.

2. That NYAKI/KITHOKA/1306 shall be distributed equally among Marion Kagutu M'Mutungi, Lucy Kaniu, Julius Wangua, Sarah Mukauthene, Esther Kabira, LK, the estate of Elizabeth Karuga, Maria Nkou, Sabera Kagona, Estate of John Kaumbuthu and Tabitha Taaru.

3. No orders as to costs for these proceedings are amongst close family members. It is so ordered.

Dated Signed and delivered in open Court at Meru this 17th Day of December, 2018

F. GIKONYO

JUDGE

In presence of

Muchiri for interested party

Petitioners in person – present

F. GIKONYO

JUDGE