



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 654 OF 2009

IN THE MATTER OF THE ESTATE OF M' MARETE GUABI -DECEASED)

GEOFFREY NTEERE P.M GUABI.....PETITIONER

-Versus-

JAMLICK MUTUA

ESTHER KINANU MARETE.....PROTESTORS

JUDGMENT

[1] This succession cause relates to the Estate of M' Marete Guabi (deceased). By Summons for Confirmation of Grant dated 4th July 2011, the Petitioner sought to distribute the estate of the deceased as follows;

A. LAND PARCEL NO. NKUENE/URUKU/799

- a). GEOFFREY NTEERE P.M GUABI
- b). EDWARD KIMATHI M' MARETE.....TO SHARE EQUALLY

B. LAND PARCEL NO. NKUENE/URUKU/53 MEASURING 29 ACRES

- a). GEOFFREY NTEERE P. GUABI-9 ACRES
- b). EDWARD KIMATHI M' MARETE-9 ACRES
- c). JAMLICK MUTUA
- d).JULIUS GITUMA.....1 ACRE

THE REMAINING BALANCE OF 10 ACRES TO BE SHARED EQUALLY AMONG THE FOLLOWING

- a). MARGARET NKIROTE
- b). FRIDAH GAKII
- c). JANE CHAKU
- d). SARAH KATHAMBI.....5 ACRES TO HAVE LIFE INTREST EDWARD KIMATHI M' MARETE AS REMINDERMAN
- e). FLORENCE KIMOTI
- f). CHARITY KARIMI

g). ALICE MUGURE

h). ESTHER KINANU.....5 ACRES TO HAVE LIFE INTREST GEOFFREY NTEERE P.M GUABI AS REMINDERMAN

C. MOTOR VEHICLE LANDLOVER –KWJ [...]

GEOFFREY NTEERE P.M GUABI

D. STANDARD CHARTERED BANK ACCOUNT NO. [...]

EDWARD KIMATHI M' MARETE

Protest

[2] By an affidavit of Protest filed in court on 4th July 2011, by Jamlick Mutua and Esther Kinanu Marete-grandson and daughter of the deceased respectively, they proposed to distribute the estate as follows;

i. LAND PARCEL NO. NKUENE/URUKU/799

EQUALLY AMONG GEOFRREY NTEERE and EDWARD KIMATHI

ii. LAND PARCEL NO. NKUENE UTUKU/53 be shared as follows;

MARGARET NKIROTE (DECEASED) SURVIVED BY JAMLICK MUTUA and JULIUS GITUMA 5 ACRES of their late mother.

iii. ESTHER KINANU 5 ACRES and JULIUS GITUMA GRANDSON 1 ACRE FROM NKUENE/URUKU/53

iv. GEOFFREY NTEERE and EDWARD KIMATHI 9 ACRES OF NKUENE/URUKU/53

v.MONEY AT STANDARD CHARTERED BANKACCOUNT [...]- EDWARD KIMATHI

vi. MOTOR VEHICLE REGSTRATION NO. KWJ 073 GEOFRREY NTEERE MARETE

[3] The other protestors on the other hand are CHARITY NDUMBA KIRIMI, ALICE MUGURE KITHINJI, FRIDAH GAKII MARETE, SARAH KATHAMBI KIMAITA, FLORENCE KAJUJU KINOTI ans JANE CHAKU M' IMBURA (daughters of the deceased); they proposed to distribute the estate of the deceased as follows;

A. LAND PARCEL NO. NKUENE /URUKU/799

(i) GOFFREY NTEERE P.M GUABI

(ii) EDWARD KIMATHI MARETE.....EQUAL SHARES

B. LAND PARCEL NO. NKUENE/URUKU/53

i). GEOFFREY NTEERE P.M GUABI.....9 ACRES

ii. EDWARD KIMATHI MARETE.....9 ACRES

iii. CHARITY NDUMBA KIRIMI.....1.25 ACRES

iv. ALICE MUGURE KITHINJI.....1.25 ACRES

v. FRIDAH GAKII MARETE.....1.25 ACRES

vi. SARAH KATHAMBI KIMSITA.....1.25 ACRES

vii. FLORENCE KAJUJU KINOTI.....1.25 ACRES

Viii. JANE CHAKU M' MBURA.....1.25 ACRES

ix. ESTHER KINANU MARETE.....1.25 ACRES

x. JAMLICK MUTUA & JULIUS GITUMA....2.25 ACRES EQUALLY (BIENG THEIR MOTHER'S SHARE-MARGARET NKIROTE-DECEASED)

xi. MOTORVEHICLE KWJ 073 BE INHERITED BY GEOFFREY NTEERE P. GUABI and MONEI IN STANDARCH CHARTERED BANK ACCOUNT NO. [...] TO EDWARD KIMATHI M' MARETE.

[4] The protestors adduced viva voce evidence in support of their respective cases. Jamlick Mutua was PW1. It was his evidence that the deceased was his grandfather who had two wives Rigiri Marete and Jerica Marete and that his mother was the only child of the 1st house and that he opposed the proposed mode of distribution by the petitioner as it was contrary to the way his grandfather had distributed his land during his lifetime. It was his further evidence that his grandfather had given each house 5 acres in Land Parcel No. 53 and that Edward Marete and Nteere M' Marete were present during the distribution. With regard to the distribution by the other protestors (the deceased's) daughters, he contended that their proposal only dealt with the land given to his mother and they had left the land left to Nteere.

[5] PW2 was Joseph Gitonga. It was his evidence that he knew the deceased as he was his neighbor and that he had gone to his home on two occasions where they discussed matters of sharing his properties to his family

[6] PW3 was Erick Kimathi Mungania. It was his evidence that he was familiar with the family of the deceased as he had been called 3 times to sit in their cases by the chief and that he had attended meeting during sharing land of the deceased.

[7] PW4 was Japheth Kinuu M' Kiambati. It was his evidence that on 11th July 1992, the deceased had shared out his properties and that he was among those present when he shared out his estate. He further testified that there were other parties who were present though some were deceased and that the petitioner as well was present. It was his further evidence that that he had been called so many other times in meetings regarding land.

[8] PW5 was Esther Kinanu Marete. It was her evidence that before the demise of her father, he had given 5 acres to her mother in his capacity as her 2nd wife and even upon her death they continued to use the land until he died and that she had never been married and that when elders sat to determine the issue, it was agreed that the land be shared as per the wives of the deceased and that she was given 5 acres by the elders since she was not married.

[9] The other protestors (daughters of the deceased) also called witnesses. Protestor witness 1 was Charity Ndumba Kirimi. She relied on her affidavit of protest filed in court on 5th July 2012, where she had deposed inter alia that the deceased had sat down with all his children and made a wish as to how he intended his properties to be shared to his children upon his demise.

[10] The other protestor was Geoffrey Nteere. It was his evidence that he wanted all the 10 acres of the land to be inherited by the daughters absolutely.

[11] Duncan Magiri Marete adopted his witness statement and testified that the deceased had given out LAND PARCEL NUMBER NKUENE/URUKU/799 to his sons; Nteere and Kimathi and that he had given each one of them 9 acres in LR NO. NKUENE/URUKU /53 and his daughter Margaret Nkirote (deceased) got 1 acre and retained for himself 10 acres.

Submissions

[12] parties filed submission to augment their various standpoints. The petitioner seems to assume that there was no dispute on any of the matters except the 10 acres in Number 53. He proposed the daughters to share the 10 acres howsoever they wish. He therefore rejected the proposals by the 1st and 2nd protestors for being against the wishes of the deceased. He submitted that the deceased had 8 daughters and all except Florence Nkirote (was separated) were married when the deceased shared out his lands to the sons.

[13] The 1st and 2nd protestors filed submission in support of their respective claims.

ANALYSIS AND DETERMINATION

[12] I have carefully considered the evidence on record, the respective modes of distribution by the 2 distinct categories of protestors (the deceased's grand son and daughter and the deceased's daughters respectively) and the petitioner herein. After close of the respective parties' case, the parties were directed to file submissions. None had however done so as at the time of writing this judgment. Nonetheless, I will determine the case on merit.

[13] The protestor's case (Jamlick Mutua's) was that the deceased was his grandfather and that he was opposed to the mode of distribution as proposed by the petitioner as the same was contrary to his grandfather's wishes during his lifetime. It was his evidence that his grandfather had given each house 5 acres in NO. 53 and each son was given 5 acres. He claims the share of his deceased mother, Margaret Nkirote i.e. 5 acres. He claimed that her late mother had even sued the deceased to transfer the land to her, but, unfortunately she died before the case could conclude. He stated that her mother was using the 5 acres during the lifetime of the deceased. They are now using the same piece of land. He insisted that the deceased shared his property in 1992. He relied on a document for an alleged meeting of 11th July 1992. Is there any other independent evidence to show that the deceased shared his assets as alleged?

[14] Notably, Jamlick was also opposed to the proposed mode of distribution by the other protestors (daughters of the deceased), contending that their proposal was unjust and unfair and that they had a hidden agenda. He however did not state how it was unjust and unfair. In cross examination he stated that the deceased did not leave a will and that he had no problem with Land Parcel number 53 at Uruku. PW2 Joseph Gitonga on the other hand testified that he had gone to the deceased's home on two occasions where the issue of sharing of the deceased's

properties was discussed. In cross examination however he stated that the deceased was not in the meetings as he was already dead, and that Mutua (protestor) is the one who prompted the chief to call the meeting. He further stated that he had never been in a meeting where the deceased shared his properties and that he did not know whether the deceased had shared his properties or not. When reexamined by Charity Ndumbi, he reiterated that he was not there when the deceased shared his properties

[14] The evidence of PW3 was startling. He stated in cross examination that he had been summoned by the chief to represent him in the meeting by family of the deceased. He admitted that the deceased was already dead at the time. He further stated he did not know whether the chief had any authority of the court to sit over distribution of the estate. When cross examined further by Charity Ndumba, he stated that the deceased had never called a meeting.

[15] Consider also the evidence of PW4, Japheth Kinuu stated in cross examination that he was present when the deceased shared out his land and that he was the one who wrote the document of the meeting of 11th July 1992. He admitted that the document was not signed. He also confirmed that none of the daughters of deceased attended the alleged meeting. The said document is of no evidentiary value.

[16] PW5, ESTHER KINANU MARETE is also a protestor. She is a daughter of the deceased. She claims 5 acres which she said were given to the house of her late mother one Jerica Marete, the wife of the deceased. Looking at the evidence, the protestors' case is that the deceased had shared out his land prior to his demise. But, I do not find such evidence especially in respect of parcel No. 53. PW2 and 3 who were called in support of PW1's case all stated in cross examination that when they attended the meetings, the deceased was already dead and they further admitted that they had never been in any meeting where the deceased shared his properties. PW2 was more categorical that he did not know whether the deceased had shared his property to his children or not.

[17] Charity Ndumba stated that the deceased said that the daughters should share the 10 acres he left from himself. She stated that Esther and the petitioner are the problem in these proceedings. She denied that the deceased had shared his assets as alleged by the Jamlick and Esther. But on the other hand she said that her late father gave more land to the sons and we should respect that fact. She supported the proposal by the petitioner that each son should get 9 acres in Number 53, 1 acre be taken by Margaret and the other daughters to share the balance of 10 acres.

[18] The only point of agreement in the evidence of all parties was that distribution of Land Parcel Number NKUENE/URUKU/799 was not in dispute. The major quarrel in on distribution of LR NO. NKUENE/URUKU/53. As alluded to earlier, there was no evidence that the deceased had distributed the property prior to his demise. Having carefully considered the 3 proposed mode of distribution by the petitioner and the protestors, I find all are actuated by greed or by contrived design to disinherit others or sheer subservience to patriarchy. None aligns with the law. I will be guided by law.

[19] The deceased was polygamous. Therefore section 40 of the Law of Succession Act shall apply. The section provides as follows:-

40. 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.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

[20] The widows are both deceased, Therefore the principle of equity in section 38 of the Law of Succession Act cited below will apply

38. 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 be equally divided among the surviving children.

[21] I would have ordered equal sharing by all children of the deceased. But, it seems all parties agree that LAND PARCEL NUMBER NKUENE/URUKU/799 should go to the sons of the deceased; Geoffrey Nteere P.M. GUABI and Edward Kimathi Marete in equal shares. I so order. Concerning LAND PARCEL NUMBER NKUENE/URUKU/53, I direct that it shall be shared equally amongst all the children of the deceased to wit:-

1. Florence Kinoti - Daughter
2. Margaret Nkirote - Daughter
3. Geoffrey Nteere - Son
4. Charity Kirimi - Daughter
5. Fridah Gakii - Daughter
6. Alice Mugure - Daughter
7. Jane Chaku - Daughter

8. Edward Kimathi - Son
9. Esther Kinanu - Daughter
10. Sarah Kathambi - Daughter

The share of any deceased beneficiaries shall devolve upon all the children of the deceased beneficiary in equal shares. There was no contestation account No. [...] at Standard Chartered Bank and M/V reg. No. KWJ [...] which shall go to Edward and Geoffrey respectively.

[22] The grant herein is confirmed in the foregoing terms. As this succession matter involves close family members, there will be no order as to costs. 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

Kithinji for Gichunge for petitioner

Mutungu for protestor – absent

F. GIKONYO

JUDGE