



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO. 501 OF 2010

IN THE MATTER OF THE ESTATE OF M'ARITHI M'RICHUNI (DECEASED)

BEATRICE WANJA M'ARITHI

BONIFACE MWITI M'ARITHI..... PETITIONERS

JUDGMENT

1. The late M'Arithi M'Richuni (hereinafter "the deceased") died on 15th November, 2007. He left behind the following surviving him:-

- (a) Beatrice Wanja M'Arithi – Daughter
- (b) Idah Gakii – Daughter
- (c) Gitobu M'Arithi Rinchuni – Son
- (d) Bonface Miriti M'Arithi – Son
- (e) Isaac Murigi M'Arithi – Son
- (f) Eunice Kaimuri Joseph – Daughter
- (g) Florence Kainyu M'Arithi – Daughter
- (h) Lucy Gakiru M'Arithi – Daughter
- (i) Jane Kooru M'Arithi – Daughter

He left the property known as Abogeta/L-Kithangari/1279 ("Plot 1279") as the only asset forming his estate.

2. On 25th October, 2010, Beatrice Wanja M'Arithi and Boniface Mwiti M'Arithi (hereinafter "the Petitioners"), petitioned for grant of Letters of Administration Intestate which was issued to them on 8th May, 2012. On 15th November, 2012, the Petitioners applied for the confirmation thereof and proposed to distribute the estate as follows:-

- (a) Gitobu M'Arithi Rinchuni - 2 Acres
- (b) Beatrice Wanja Arithi - 2 Acres

- (c) Idah Gakii - 2 Acres
- (d) Boniface Mwiti Arithi - 2 Acres
- (e) Isaac Mwirigi - 1½ Acres
- (f) George Kimathi - ½ Acres
- (g) Idah Mukami Muthamia - ½ Acres
- (h) Eunice Kaimuri Joseph - Balance

From the distribution proposed by the Petitioner, Florence Kainyu M'Arithi, Lucy Gakiru M'Arithi and Jane Kooru M'Arithi, all daughters of the deceased were excluded.

3. From the record, it would seem that Gitobu M'Arithi Rinchuni (hereinafter "the Protestor") filed a Protest to the distribution in or about 2013 but that Affidavit of Protest was not on record, at the time of writing this Judgment. The Court gathered about its existence from the Supplementary Affidavit of the Petitioners sworn on 14th October, 2013 and filed in Court the same day. Directions were given on 9th March, 2015 by Makau J. to the effect that the distribution be determined by way of submissions. The Judge gave the parties 21 days each to file and serve the submissions. On 8th February, 2017, the parties fixed the matter for mention on 11th April, 2017 to confirm the filing of submissions. When the matter came up on that day, no submissions had been filed by any of the parties and the Court decided to reserve the matter for judgment since two (2) years was a long time for the parties not to have filed their submissions. It was quite clear that the parties were unwilling to do so.

4. Pursuant thereto, on 9th May, 2017, the Protestor filed an Affidavit in Protest wherein he set out his own mode of distribution. He contended that there were three (3) sons, six (6) daughters and three (3) grandchildren belonging to the deceased. That before the deceased died, he had shared his property to his children and grandchildren; that except two (2) married daughters, all the rest of the beneficiaries were living within Plot 1279. He therefore contended that the estate should be distributed in accordance with the wishes of the deceased as follows:-

- (a) the sons to get 2 acres each;
- (b) the unmarried daughters to get 1 acre each;
- (c) the married daughters get ½ an acre each, while three grand children and one George Kimathi Kithinji each get ½ an acre. He further contended that George Kimathi Kithinji had paid KShs.30,000/= for the sub-division of the property as had been decided by the deceased.

5. I have considered the Affidavits on record. Since the Court did not have the benefit of the submissions by the parties, it only relied on the statements contained in the Affidavits on record to arrive at its decision.

6. The principles applicable to distribution of a deceased's estate are very clear. One has to be a beneficiary or a dependent to be able to participate in distribution. A dependant is that who is shown to have been maintained by the deceased as at the time of the deceased's demise. That is clear from Section 29 of the Law of Succession Act ("LSA") which provides:-

"S. 29. For the purposes of this Part, "dependant" means-

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

7. As regards beneficiaries and their shares, Section 38 of the LSA is clear in its terms:-

"S. 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 shall be equally divided among the surviving children."

8. The spirit inherent in Section 38 aforesaid as far as distribution of estates of deceased persons is concerned is maintenance of equity.

9. I have looked at the two proposed distributions and I make the following observations:-

(a) there are nine children and therefore beneficiaries of the estate;

(b) the averments in the Affidavit of Protest sworn on 4th May, 2017 by the Protester was not controverted or challenged;

(c) the parties are agreeable on the shares to be distributed to Gitobu M'Arithi, Boniface Miriti of 2 acres each and George Kimathi Kithinji (1/2 acre);

(d) the distribution proposed by the Petitioners has left out three (3) daughters of the deceased without providing any reason for their exclusion. It was not alleged that they had renounced their interest in the estate and none was on record;

(e) the Petitioners' distribution included a stranger, Idah Mukami Muthamia. The basis of her entitlement was not given;

(f) the proposed distribution by the Protestor included three (3) grandchildren of the deceased being, Geoffrey Kimathi, Derrick Koome and Kelvin Kinoti to whom he proposed to distribute ½ acre each which he alleged was given by the deceased before his demise.

10. In view of the foregoing, and the provisions of Sections 29 and 38 of the LSA, there was no basis that was laid to include Idah Mukami Muthamia. She is to be excluded in any distribution. If she is a buyer, she has no claim as against the estate but as against the individual beneficiaries from whom she purchased the portion of land she claims to be entitled to.

11. There was no reason that was advanced to explain why Florence, Lucy and Jane Kooru were excluded from the distribution. If it is their marriage status, then that cannot be a reason in law to exclude them. The Court of Appeal has held in the case of ***Rono v Rono & Another Eldoret CA No. 66 of 2002*** amongst other cases that on matters of inheritance, there is no son or daughter, married or unmarried. All beneficiaries are equal before the law. In any event, Article 27 of the Constitution of Kenya prohibits any form of discrimination whatsoever. Accordingly, the three daughters having not renounced their interest, their exclusion is illegal. There was no explanation that was advanced why two of the daughters, Beatrice Wanja Arithi and Idah Gakii are to get 2 acres each while Eunice Kaimuri Joseph gets 1.9 Acres and the other three daughters (Florence Kainyu, Lucy Gakiru and Jane Kooru) get nothing.

12. Further, in the distribution by the Petitioners, two acres each are distributed to two sons of the deceased (Gitobu M'Arithi and Boniface Mwiti) whilst Isaac Mwirigi is allocated 1½ acres only. There is no explanation that was given for that discrepancy.

13. On the other hand, the Protestor swore that, the deceased had shared his land to his children and grandchildren before he passed on. That the deceased had applied to the local Land Control Board and obtained consent to share his property to his children and grandchildren as aforesaid. He produced a copy of an Application for Consent which was approved on 15/8/2007 before he died. From the said documents, it was clear that the deceased had applied and obtained consent to subdivide his property into seven (7) portions, to wit, five (5) portions thereof of 2 acres each, 0.5 acre and the balance of 1.929 Acres. The documents do not show how the subdivisions or the portions were to be shared. However, the Protestor swore that each of the three (3) sons was to take two (2) acres each, the two unmarried sisters were to share an acre each, the four (4) married sisters were in turn to share two (2) acres equally whilst the rest of the property was to go to the grand children.

14. In the absence of contrary evidence, I am inclined to believe the Protestor's version. It is clear that the deceased had five (5) portions of 2 acres each which could be divided as follows:-

- (a) three portions to the three (3) sons;
- (b) one portion to the unmarried daughters, and
- (c) one portion to the unmarried daughters.

15. As regards the 0.5 acres, it was deponed that it was meant for George Kimathi Kithinji who had paid some money to effect the sub-division of the land undertaken by the deceased. Both the Petitioners and Protestor agree on this fact. What is not clear is the last portion of 1.92 Acres. According to the Protestor, this was to be divided to the three identified grandchildren. Since there was no evidence to the contrary, the Court has no reason to disbelief that fact. Accordingly, the estate will be distributed along the lines proposed by the Protestor as follows:

- (a) Gitobu M'Arithi Rinchuni - 2 Acres
- (b) Boniface Miriti M'Arithi - 2 Acres
- (c) Isaac Murigi M'Arithi - 2 Acres
- (d) Beatrice Wanja M'Arithi - 1 Acre
- (e) Idah Gakii - 1 Acre
- (f) Eunice Kaimu Joseph - 0.5 Acres
- (g) Florence Kainyu M'Arithi - 0.5 Acres
- (h) Jane Kooru M'Arithi - 0.5 Acres
- (i) Lucy Gakiru M'Arithi - 0.5 Acres
- (j) George Kimathi Kithinji - 0.5 Acres
- (k) Geoffrey Kimathi
- (l) Derrick Koome - Balance in equal shares
- (m) Kelvin Kinoti

This being a family matter, I will make no orders as to costs.

It is so decreed.

DATED and DELIVERED at **MERU** this 25th day of May, 2017.

A. MABEYA

JUDGE

25/05/2017