



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO.568 OF 2015

(FORMERLY CHUKA SUCCESSION CAUSE NO. 237 OF 2015)

IN THE MATTER OF THE ESTATE OF ANDELINA NDEGE MBIUKI (DECEASED)

FELIMINO KABURU GERALD.....PETITIONER

VERSUS

ASTERIA GATUNE MUGAMBI.....1ST OBJECTOR

SILVIA MUTHONI DESDERIO.....2ND OBJECTOR

DOROTHY RUGURU GERALD.....3RD OBJECTOR

ALEXANDA KARANI MBIUKI.....4TH OBJECTOR

CHARLES GICHUNGE GERALD.....5TH OBJECTOR

J U D G M E N T

1. This cause involves the estate of the late **ANDELINA NDEGE MBIUKI** who died intestate on 9th December, 2012 domiciled at Iruma Sub-location as per the death certificate presented to this court. The deceased died leaving the following surviving her.

- (i) Filimino Kaburu Gerald
- (ii) Victor Kiruja Gerald
- (iii) Jeremy Mbabu Mbiuki
- (iv) George Mugendi Gerald
- (v) Alexander Karani Gerald
- (vi) Charles Gichunge Gerald
- (vii) Astria Gatune Mugambi
- (viii) Dorothy Ruguru Gerald

(ix) Silvia Muthoni Desderio

(x) Kaari Gerald

(xi) Nicholas Kimathi Mwiti

2. The deceased left behind a property known as L.R No. Mwimbi/C. Magutuni/1426 which now comprise the estate in this cause. Filimino Kaburu Gerald, the appointed administrator in this cause took out summons for confirmation of grant dated 9th February, 2016 and proposed to have the entire estate vest to one Nicholas Kimathi Mwiti, a proposed purchaser of the said estate. The appointed administrator has supported his proposal through an affidavit sworn on 16th August 2016 where he has deponed that the deceased had declined to give her daughters any share in the estate. In his reasoning, the daughters should not get a share by virtue of the fact that they are all married. He has further added that they agreed as a family to dispose off the estate to one Nicholas Kimathi Murithi and share the proceeds equally by all family members though he did not specify whether the family members include the daughters of the deceased.

3. The petitioner/administrator in his proposal is supported by Jeremy Mbabu Mbiuki, Victor Kiruja Gerrald and Nicholas Kimathi Mwiti all of who have sworn respective affidavit in support adding, that the proposed purchaser has infact paid a deposit of Kshs.250,000/- in consideration.

4. Asteria Gatune Mugambi, Silvia Muthoni Desderio, Dorothy Ruguru Gerald, Alexander Karani Mbiuki and Charles Gichunge Gerrald on the other hand have all objected to the above proposal and filed protests through affidavits sworn on 31st October, 2016. The protestors have denied there being a family meeting where distribution of the estate in this cause was discussed. They have also denied that there was a meeting at the Chief's office where the Petitioner's proposal was discussed.

At the hearing of the protest Silvia Muthoni Desderio told this court that when their late father was alive, he gave all the sons their portions and left Mwimbi/Central Magutuni/1426 for their late mother (deceased herein) and for the benefit of all the daughters namely:-

(i) Silvia Muthoni Desderio

(ii) Austeria Gatune Mugambi

(iii) Dorothy Ruguru Gerald

(iv) Ciriaka Kaari Gerald

Asteria Gatune Mugambi in her evidence supported the evidence tendered by her sister and added that she and her son are in occupation of the estate at present. The same was echoed by Dorothy Ruguru Gerald.

6. Alexander Karani Mbiuki and Charles Gichunge Gerald in their evidence told this court that they were in support of their sisters' protest as they confirmed that as sons they had already benefitted from share of land given to them by their late father Gerrald Mbiuki (deceased) in the year 2000. In their view the parcel should be given to the sisters who did not get any share when their late father sub-divided his land.

7. Felimino Kaburu Gerald, in his defence to the proposed mode of distribution acknowledged that their late father had indeed given sons some portions leaving behind parcel Mwimbi/C/ Magutuni/1426 measuring 0.294 acres to their late mother (the deceased herein). He admitted that he himself got 0.80 acres. He reiterated that his sisters were not there when they gave their late mother (deceased herein) her right to inherit Mwimbi/C. Magutuni/1426. He added that the sons of the deceased also got their respective shares vide a Succession Cause No. 108 of 2008 where the deceased mother also got her share. He further testified that the estate herein should go to Nicholas Kimathi Mwiti, because he had received part of the purchase money as the administrator.

8. The issue before court is fairly simple and straight forward in view of the fact that all parties do recognise one another. The issue at hand is whether the daughters of the late Andelina Ndege Mbiuki should be the only ones benefiting from the distribution of the estate herein or whether the Petitioner's proposal is well grounded in law.

9. The net estate in this cause comprises that parcel of land known as Mwimbi/C. Magutuni/1426. That is not in dispute here. It is also an undisputed fact that the said parcel of land resulted from the sub-division of the original parcel No. Mwimbi/C. Magutuni/363 which was the property that comprised the estate of the late Gerrald Mbiuki (deceased), father to both the Petitioner and the Protestors herein and husband to the late Andelina Ndege Mbiuki whose estate is now the subject matter in the proceedings now before this court. The Petitioner told this court that their late father had already sub-divided his land prior to his demise and that upon his death, they agreed that their late mother, Andelina Ndege Mbiuki (deceased) and the widow to the late Gerrald Mbiuki takes out letters of administration which was done vide Chuka P.M' Court Succession cause No.108 of 2008. In that cause all the sons and the widow (deceased herein) benefitted from equal share of the estate. The share that went to the widow (the deceased herein) is what comprises the estate herein and it is what the 1st, 2nd and 3rd Protestors are claiming as the daughter of the deceased herein who did not benefit from the earlier distribution of the estate of the late Gerrald Mbiuki M'Chabari.

10. To begin with the petitioner's proposal he has proposed to have the estate herein divested to one Nicholas Kimathi Mwiti, because he has paid a deposit to purchase the estate. That proposal is contrary to clear provisions of Section 82 (b) (11) Law of Succession Act which clearly outlaws any sale of immovable property prior to the confirmation of grant. The provisions states as follows:-

"No immovable property shall be sold before confirmation of the grant."

The grant herein has not been confirmed.

The purported sale and transaction between the administrator herein whether done with approval of the family members or the area Chief is null and void ab initio. The law does not recognise such arrangements. An administrator can only sell an immovable property comprising an estate of a deceased person only after confirmation of a grant. In this cause the grant issued to the petitioner as observed has not yet been confirmed. The proposal to have the estate distributed to Nicholas Kimathi Miriti is therefore untenable in law and unacceptable regardless of whether the proceeds of such sale will be shared equally among the family members or not. The amount purportedly paid as deposit is only recoverable as a debt from whoever was paid.

11. Secondly, this court has considered the evidence tendered and the affidavits filed in this cause and it is clear that following benefitted from estate of Gerrald Mbiuki M'Chabari vide Chuka P.M's Court Succession Cause No. 108 of 2008:

(i) Charles Gichunge Gerald

(ii) Alexander Karani Mbiuki

(iii) Jeremy Mbabu Mbiuki

(iv) George Mugendi Mbiuki

(v) Victor Kiruja Gerrald

(vi) Filimino Kaburu Gerald (the Petitioner herein) and

(vii) Andelina Ndege Mbiuki (the deceased herein)

The four daughters Astria Gatune Mugambi, Dorothy Ruguru Gerald, Silvia Muthoni Desderio and Kaari

Gerald did not get any share. Under the provisions of **Section 35** of the **Law of Succession Act**, all children regardless of sex or marital status are entitled to a share of the estate of their parents unless they renounce their right to inherit. The Protestors were therefore entitled in law to get a share during the distribution of the estate of their late father. In view of what transpired in the said cause, which for all practical purposes is now water under the bridge, **Section 42** of the **Law of Succession Act** should and is hereby interpreted to cater for their interest in that the share that went to their late mother, Andelina Ndege Mbiuki (deceased in this cause) should solely go to them in view of the fact that the petitioner and his fellow brothers had previously benefitted from their father's share. It will be unfair and unjust for them to now claim another share from their late mother's estate.

12. In view of the foregoing, this court finds and makes the following orders in the interest of justice.

(i) The grant issued on 28th April 2015 to the Petitioner/Administrator herein is hereby confirmed.

(ii) The estate comprised in that property known as Mwimbi/C.Magutuni/1426 shall be shared equally among the following:-

- a. Asteria Gatune Mugambi
- b. Silvia Muthoni Desderio
- c. Dorothy Ruguru Gerald and
- d. Kaari Gerald

(iii) The Petitioner shall surrender the original title and execute all the requisite documents to the District Land Registrar to facilitate transmission and in default, the Deputy Registrar is directed to execute all the requisite documents while the Registrar is directed to dispense with the production of the original title and pin if the administrator becomes reluctant to co-operate.

(iv) I shall make no order as to costs as this is a family matter.

Dated and delivered at Chuka this 18th day of May, 2017.

R. K. LIMO

JUDGE