



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 9 OF 2016

**IN THE MATTER OF THE ESTATE OF NDEGA IMWITA alias DIGA M'IMWITHA
(DECEASED)**

AND

ALFRED NYAGA KARIBA.....PETITIONER

- VERSUS -

DONATOES MUTEMBEI KARIBA.....CAVETOR/PROTESTOR

LUCYLINE MUMU MBAE.....INTERESTED PARTY/PROTESTOR

J U D G M E N T

1. The cause herein relates to the estate of the late **NDEGA IMWITA alias DIGA M'IMWITA** (deceased) who died intestate on 14th October, 1982 domiciled in Gaichau village, Chogoria. The deceased died leaving the following dependants surviving him as per the chief's letter dated 15th April, 2015,

- (i) Florence Rima Imwita- Widow
- (ii) Alfred Nyaga Kariba- Son
- (iii) John Njagi Kariba- Son
- (iv) Erick Mwititi Kariba- Son
- (v) Nicholas Mugambi Kariba- Son
- (vi) Frankline Mwandiki- Son
- (vii) Bonface Mutugi- Son
- (viii) Donatoes Mutembei- Son
- (ix) Grace Kangai- Daughter
- (x) Millicent Gatakaa- Daughter

(xi) Lucy Mumu- Daughter

(xii) Joyce Mukwanjue- Daughter

2. The Petitioner in this cause Alfred Nyaga Kariba was appointed the administrator of the estate in this cause by this court on 17th May 2016. The said administrator took out summons for confirmation of grant dated 29th November, 2016 and gave a proposed mode of the distribution of the estate in paragraph 5 of his supporting affidavit sworn on 29th November, 2016.

3. The application for confirmation was resisted by Donatoes Mutembei Kariba who filed affidavit of protest stating that the proposed mode by the administrator was not fair. The protest appears to have made the administrator to amend his proposal on the mode of distribution which he did vide what he described as amended summons for confirmation of grant dated 3rd March, 2017. In the new proposal the administrator proposed to have the distribution of the estate done as follows:

MUTHAMBI/IGAMURATHI/301

a) Alfred Nyaga Kariba to get-0.21Acre

b) Alfred Nyaga Kabira to get-0.51 Acre

c) Lenet Millicent Gatakaa Kariba

Grace Kangai KaburuTo share 0.11 Acre

Lucyline Mumu Mbaejointly

d) John Njagi to get - 0.21 Acre

e) Donatoes Mutembi Kariba to get-0.72 Acre

f) Erick Mwiti Kariba to get-0.72 Acre

g) Frankline Mwandiki Kariba to get-0.72 Acre

h) Nicholas Mugambi Kariba to get-0.72 Acre

i) Bonface Mutugi to get -0.72 Acre

4.The 2nd proposal did not go down well with Lucyline Mumu Mbae who filed an affidavit of protest sworn on 6th May, 2017 stating that the administrator had discriminated against the daughters of the deceased contrary to the provisions of **Article 27 (1) of the Constitution**. She further deponed that the proposed mode was unfair and gave the following proposal;

(i) Alfred Nyaga Kariba-0.21 Acre

Alfred Nyaga Kariba-0.48 Acre

Total -0.69 Acre

(ii) Donatoes Mutembei Kariba-0.30 Acre

Donatoes Mutembei Kariba-0.38 Acre

Total-0.68 Acre

(iii) Erick Mwiti Kariba-0.69 Acre

(iv) Frankline Mwandiki Kariba-0.68 Acre

(iv) Nicholas Mugambi Kariba-0.68 Acre

(v) Bonface Mutugi-0.68 Acre

(vii) John Njagi Kariba-0.22 Acre

John Njagi Kariba-0.47 Acre

Total-0.69 Acre

(viii) Lucyline Mumu-0.25 Acre

(ix) Lenet Millicent Gatakaa

Grace Kangai Kaburuto share 0.11 Acre

Joyce Mukwanjue Nyagajointly

5. In her written submissions made through learned counsel, P.M Mutani Advocate, the protestors Lucyline Mumu Mbae and Donatoes Mutembei Kariba have contended that all the children of the deceased ought to be treated equally and not discriminated owing to the protection accorded to them under **Article 27(4) of the Constitution**. It is further submitted that because the deceased is not survived by any spouse, this court should apply the provisions of **Section 38 of the Law of Succession Act**. However, the protestors in a strange twist have at the same time urged this court to treat the other daughters as though they have waived their rights to an equal share and on that basis they have urged me to adopt the proposed mode suggested by Lucyline Mumu Mbae in her affidavit of protest.

6. The administrator in response to the protestor's contention has vide the written submission by his learned counsel Ms Njeru Ithiga & Co. Advocate submitted that the other daughters of the deceased except the protestors are fine with the proposed mode of distribution. The administrator has contended that the protestors' mode of distribution goes against the wishes of the family. It is submitted that the daughters of the deceased are all married and settled in their respective homes and that the deceased had prior to his demise had shown each child where to settle. In his view, any child going against the wishes of the deceased will be under a spell of a curse. It is contended that the proposed mode of the protestors would interfere with the existing occupations and may lead to demolitions of already built structures on the estate. The administrator has urged me to find that there is no way two children out of eleven children can be allowed to cause disharmony by going against what was agreed by the family.

7. The deceased in this cause died intestate after Law of Succession Act had come into operation (1st July, 1981). The provisions of **Section 2(1) of the Law of Succession Act** clearly stipulates that the Law of Succession Act Cap 160 Laws of Kenya "***Except as otherwise expressly provided in this Act or any other written law..... shall constitute the law of Kenya in respect of, and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of the Act and to the administration of estates of those persons (sic)***".

The protestors have contended that there is no spouse surviving the deceased though the letter from the chief states that Florence Rima Imwita survived the deceased, this court shall assume that the said letter may have been overtaken by the event of demise of the said Florence Rima Imwita. This is because all the children in this cause are in agreement that there is no surviving spouse at the moment if that is the case, this court is in agreement with the protestors that the provisions of **Section 38 of the Law of Succession Act** will apply in the distribution of the estate of the deceased herein.

8. The proposed mode of distribution suggested by the administrator from the word go was rather skewed and unfair to the other children of the deceased. I have noted that he tried to change the mode through an amendment but even then the proposed mode therein is not tenable in law. The administrator has justified his proposed mode by fact that the daughters of the deceased are all married and that it is only two out of eleven that are against the proposed mode. This contention flies in the face of the law for two reasons;

(i) The provisions of **Article 27(1) of the Constitution** guarantees equality of all in the eyes of the law. Under **Article 27(4) the Constitution** is even clearer and forbids discrimination on grounds of inter alia marital status. So for the administrator to state that the daughter should be given less share of the estate because they are married, he is giving a suggestion that completely untenable both in the Constitution and the provisions of **Section 38 of the Law of Succession Act**.

(ii) There is no legal basis to find that a majority decision is always right. It is obvious that even where a lone voice is on the right side of the law, that voice normally carries the day in law. This court certainly shall not base its decision on numbers. The decision of this court shall further the dictates of the law.

9. I have noted that the protestors have also made odd proposed mode in law even after correctly pointing out the correct position of the law under **Section 38 of the Law of Succession Act**.

In the premises this court finds that the both proposals by the administrator and the protestors are discriminatory and not based on the law. I direct that the estate comprised in that property known as **Muthambi/Igamurathi/301** shall in accordance with **Section 38 of Law of Succession Act** be equally divided among the following children of the deceased.

- (i) Alfred Nyaga Nyaga Kariba
- (ii) John Njagi Kariba
- (iii) Erick Mwitika Kariba
- (iv) Nicholas Mugambi Kariba
- (v) Lenet Millicent Gatakaa Kariba
- (vi) Grace Kangai Kaburu
- (vii) Joyce Mukwanjue Nyaga
- (viii) Lucyline Mumu Mbae
- (ix) Donatoes Mutembei Kariba
- (x) Frankline Mwandiki Kariba and
- (xi) Bonface Mutugi.

I further direct the surveyor to carry out the survey work and try as much as possible to ensure that each child is given where they have constructed their respective houses to minimize as much as it is practically possible demolitions and also to ensure that each child get a fair share of an arable section as this court was told that certain sections of the estate are not arable. Each party shall bear own costs. The surveyors fees shall be equally shared among all the children, and I grant any of the named children liberty to apply in the event that some children become unco-operative to maintain some advantage over the others.

Dated and delivered at Chuka this 27th day of July, 2017.

R. K. LIMO

JUDGE

27/7/2017

Judgment signed, dated and delivered in the presence of both parties and Ithiga Advocate appearing for the Petitioner.

R. K. LIMO

JUDGE

27/7/2017