



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 686 OF 2015

IN THE MATTER OF THE ESTATE OF DANIEL MUINDI- DECEASED

ASHFORD MIRITI.....PETITIONER

VERSUS

DANIEL NYAGA.....OBJECTOR

J U D G M E N T

1. This cause relates to the estate of the late **DANIEL MUINDI** (hereinafter to be referred to as the deceased) who died sometime in 1962 domiciled in Nganga Location. The petition for letters of administration indicates that the deceased died living behind the following children namely:-

- (i) Nahason Mbugua
- (ii) Ashford Miriti
- (iii) Susan Chuka &
- (iv) Esther Igoki

The deceased also is reported to have left behind one other dependant named **DANIEL NYAGA** as per a similar petition for letters of administration presented vide *Chuka Senior Resident Magistrate's Succession Cause No. 2 of 1999*. The two petitions to wit *Chuka Resident Magistrate's Court Succ. Cause No. 12 of 2000* presented by Nahason Mbugua and *Chuka Senior Resident Magistrate's Succession Cause No. 2 of 1999* were later consolidated because of obvious reasons and later transferred to this court through the above cause. Nahason Mbugua, was appointed the administrator of the estate of the deceased by this court on 17th June, 2002 vide a grant which was issued later on 9th May 2016.

2. The appointed administrator later on 16th May 2016 took out summons for confirmation of the said grant dated 13th May 2016 and proposed to have the estate comprised in **L.R. MWIMBI/MAGUMONI/18** distributed as follows:-

- a) Ashford Miriti - 3 acres
- b) Susan Chuka Geoffrey - 2 acres
- c) Nyaga Daniel - 1/2 acre

3. Nyaga Daniel, the protestor herein, protested and proposed that he should be allowed to inherit the whole estate exclusively. In an affidavit of protest sworn on 18th May, 2016, the protestor deposed that the deceased herein was married to two wives namely:-

(i) Jemimah Ciamburi (deceased) and mother to the protestor.

(ii) Joyce Ciamuthama (deceased) and mother to Nahason Mbugua, Ashford Miriti, Susan Chuka and Esther Igoki.

4. According to the protestor, the deceased gifted land parcel **No. L.R. MWIMBI/N. MUGUMANGO/51** to Nahason Mbugua and Ashford Miriti in his lifetime and that Ashford Miriti had in fact settled therefore and only returned to the estate upon the demise of the deceased. In his evidence in court the protestor told this court that Ashford Miriti lives on the other property that was given to him as a gift by the deceased. It was his evidence that the deceased instructed Nahason to hire the property now forming the estate and go and settle in parcel **No. MWIMBI/N.MUGUMANGO/51**. He further deposed that he and his family have been in occupation of the estate for the entire period of their lives and should therefore be allowed to inherit the same.

5. The protestor's position was supported by **JUSTUS MUTURI M'REWA** who deposed that he was a cousin to the parties in this cause. According to him Nahason Mbugua and Ashford Miriti should be contended with land parcel **No.L.R. MWIMBI/N. MUGUMANGO/51** and leave the estate to the protestor.

6. The petitioner on the other hand insisted that the deceased was married only to one wife and that the protestor was adopted by the deceased when his mother, Jemima Ciamburi died at the time of giving birth to the protestor at Chogoria Hospital. In his affidavit sworn on 1st July 2016, the administrator deposed that he is the first born in the deceased family followed by Susan Chuka, Ashford Miriti and Esther Igoki in that order. According to the petitioner, the protestor's mother Jemima was a relative to the deceased and that the deceased took care of him on that ground. It was his evidence that they moved out of the estate due to his drinking habits and that he came back in 1976 after the demise of the deceased and requested to be shown where to put up a house which was done and that he put up a house and occupied almost 1/2 an acre where he lives today. The administrator conceded that he was given **LR. NO. MWIMBI/N. MUGUMANGO/51** as a gift *inter vivos* by his late father and as such he was not interested in the estate herein. He however denied that he was instructed by his late father to share the same gift with Ashford Miriti or anyone.

7. The petitioner's position in this cause was supported by **SUSAN CHUKA** who testified and affirmed that the protestor herein was adopted by the deceased. He further testified that one of their sister, Esther Igoki passed on last year. She also staked a claim in the share of the estate asking that the estate should be distributed to her, Ashford and Esther with the protestor being allowed to retain the 1/2 acre of the estate he currently occupies. This position was also supported by Ashford Miriti a son to the deceased who also testified in this cause.

8. In his written submissions made through **M/s J.K. NTARANGWI & CO. ADVOCATE**, the petitioner has submitted that the grant issued in this court on 9th May 2016 was proper as it was based on a grant given on 17th June, 2002. The petitioner has further submitted that the protestor is not a biological child of the deceased as he was adopted and taken care of in the hope that when he grew up he would sort himself out by following up his late mother's entitlement from his grandfather. According to the petitioner, the protestor does not qualify to be referred to as a son of the deceased. It submitted that the protestor should have brought up his claim on the estate as a dependant pursuant to **Section 26 of Law of Succession Act**. That in the petitioner's view would have kick started the operation of **Section 28 (a) to (g) of the Law of Succession Act** (Cap 180 Laws of Kenya) which would determine reasonable provision to be made to the protestor. The petitioner has maintained that the protestor should not claim more than 1/2 an acre he was shown by the petitioner's late mother.

9. The petitioner has submitted that the estate should be distributed as follows:-

- (i) Ashford Miriti - 3 acres
- (ii) Susan Chuka Geoffrey - 2 acres
- (ii) Nyaga Daniel - 1/2 acre

10. The protestor on the other hand has contended that the petitioner presented two applications for confirmation of grant dated 20th June, 2006 and the current application dated 13th May, 2016 and has faulted the petitioner for not withdrawing the former application before presenting the present application. He has further pointed out that in the former application, Susan Chuka, had not staked any claim on the estate and faulted her present claim on the estate as an afterthought.

11. The protestor has submitted that he grew up knowing that the deceased and the late Joyce Ciomuthamia were his parents because his own mother, Jemimah Ciombura died when he was born and that he knew no other parent or home except the deceased home. It is argued that because the deceased picked up the protestor from Chogoria Hospital as a baby and took care of him it should be presumed that Jemimah Ciombura was the wife of the deceased and that the contention by the petitioner that he was taken care of out of empathy or humanitarian grounds is misleading. It is submitted that the protestor grew up with the other children of the deceased and that he has every right to be regarded and treated as any other child of the deceased. He has faulted the petitioner and the other children for not raising the issue of paternity during the lifetime of the deceased and has termed the issue of paternity as an afterthought aimed at disinheriting him. He has further contended that the provisions of **Section 29(b)** of the **Law of Succession Act** covers him as he is a dependant within the meaning of that Section of the law. On that basis the protestor has proposed that the estate should be distributed as follows:-

- (i) Ashford Miriti - 2.50 acres
- (ii) Nyaga Daniel - 2.50 acres
- (iii) Susan Chuka Geoffrey - 0.5 acre

12. This court has considered the evidence tendered in this cause and the submissions made by both counsels.

Before I deal with the main issues in this cause, let me make it clear that the subject of this Judgment is the summons for confirmation of grant dated 12th May, 2016. This court clearly gave directions on 9th May, 2016 that upon transfer of this cause from Meru High Court, this cause would be entertained afresh and proceed to issue the grant that was granted on 17th June, 2002. That in effect meant that the application dated 20th June 2006 was to be treated as withdrawn and I do find it as such. The only pending application as such is the summons dated 13th May, 2016 which is the subject of protest filed herein and the decision of this court as expressed in this Judgment.

13. The main issue in this cause is whether or not the protestor was a child to the deceased if so what should be the mode of distributing the estate herein. The evidence adduced shows that on a balance of probability, the protestor herein was not a child of the deceased. The protestor did not adduce any evidence to show that here deceased mother was married to the deceased or cohabited with him. What is however not disputed is the fact that the protestor was taken up as a small baby after his mother Jemimah Ciombura died and was taken care of by the deceased and the petitioner's late mother. The Petitioner himself conceded that the protestor was adopted in their home by their deceased father. Susan Chuka testified that she grew up together with the deceased in their home and that he was treated at home like anyone of them and infact stated that their late mother brought up the protestor together with their deceased sister Esther who was the agemate of the protestor. Justus Muturi M'Rewa (PW₂) testified that the deceased took the protestor "**as his own child**" because he "**was a good christian that is why he took over Nyaga as his child.**" That in my considered view, shows that the protestor herein was adopted by the deceased as his child and even if evidence emerged that the deceased was later disappointed when the

protestor grew up and became a drunkard, that still cannot change the fact that he is an adopted child to the deceased in view of the fact that he brought him up educated him and did all that any parent would do for their children. As to whether he did that for philanthropic reasons being a "**good christian**" as we are told or for any other reason, may be hard to tell. This court however finds that the protestor was should be considered as an adopted child of the deceased going by the evidence tendered in this court.

14. The petitioner has submitted that the protestor should only be given 1/2 acre where he is living because he did not apply to be provided under **Section 26** of the **Law of Succession Act** as a dependant. A look at the provision of **Section 26** of the **Law of Succession Act** shows that section applies where a dependant is not adequately taken care of by either the will left behind by a deceased or on applicable law (sections) dealing with intestacy. The section states:-

"where a person dies after commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate." The above provision in my view does not apply to the situation herein.

In my considered view the protestor's claim falls squarely under **Section 29** of the **Law of Succession Act** because he is a dependant within the meaning ascribed by that Section. He was said to have been taken care by the deceased right from when he was born and brought up by the deceased as his own child. **Section 29 (b)** provides that children whom the deceased had taken into his family as his own and being maintained by the deceased immediately prior to his death should be considered as dependants. This court finds that the protestor herein was a dependant to the deceased and deserves to be treated as such in the distribution of the estate.

15. The upshot of this is that the grant issued by this court on 9th May, 2016 is hereby confirmed.

The distribution of the estate of a deceased person who has left no spouse is provided under **Section 38** of the **Law of Succession Act**. The property forming the estate should be distributed equally among the surviving children of the deceased. Both counsels in this cause are in agreement that the surviving children are Nahason Mbugua, Susan Chuka and Ashford Miriti. In addition to these children, this court finds that the protestor should also be considered as a child because the deceased not only recognized him as such but the law as I have observed treats him as a "**dependant**" of the deceased. The parties including Nahason Mbugua further agree that, Nahason Mbugua benefitted from a gift *intervivos* from his late father in form of parcel **No. MWIMBI/N.MUGUMANGO/51**. Having benefitted from a previous gift, **Section 42** of the **Law of Succession Act** provides that such a gift should be taken into consideration when distributing the estate of a deceased person perhaps that is the reason why Nahason Mbugua infact is not claiming any share from the estate herein. This court finds that the estate comprised in **MWIMBI/N.MUGUMANGO/18** herein should and is hereby distributed equally among the following:-

- (i) Ashford Miriti
- (ii) Susan Chuka Geoffrey &
- (v) Nyaga Daniel

This being a family matter I make no order as to costs.

Dated and delivered at Chuka this 30th day of October, 2017.

R.K. LIMO

JUDGE

30/10/2017

Judgment signed, dated and delivered in the open court in presence of Mugo Advocate for Daniel Nyaga (also present) the objector, and Murithi holding brief for Ntarangwi for Ashford Mwiti the Petitioner.

R.K. LIMO

JUDGE

30/10/2017