



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

SUCCESSION CAUSE NO 558 OF 2013

FORMERLY NYERI HC SUCC CAUSE NO 416 OF 2012

IN THE MATTER OF THE ESTATE OF DEDAN KARIUKI KUYAI DECEASED

MARGARET MUTHONI MAINA.....APPLICANT

VERSUS

1. NELIUS WANGECHI KARIUKI

2. CECILIA WANGUI KARIUKI

3. CHARLES KUYAI KARIUKI

4. JAMES MURAYA KARIUKI.....RESPONDENTS

J U D G M E N T

1. This judgment concerns the summons herein dated 30/04/2012 by which the Applicant, **Margaret Muthoni Maina**, sought revocation of grant made in **Kangema SRM Succession Cause No 85 of 1998**. The grant was made pursuant to a judgment of the lower court. That judgment was to the effect that the Deceased's estate comprising one parcel of land, L.R. LOC. 13/GITUGI/1895 measuring approximately 5.1 acres should be shared in accordance with section 40 of the Law of Succession Act, as is evidenced by the last paragraph of the judgment

“From what I gather from the two petitioners’ evidence....They do not agree with each other as to how the Deceased’s property is to be devised. Both the petitioners are aged women and their two sons are young and able. What is to be decided by this court should be in the best of interest to both parties herein. In the interests of justice I am opined that I should invoke section 40 of the Law of Succession Act. The provisions of sections 35 – 38 show the rules to devolve the property. The petitioners shall get a life interest of the whole residue of the net intestate estate.”

2. For the information of the learned magistrate the various formulas for devolving the net intestate estates of deceased persons (to be determined by the particular circumstances of the particular deceased at the time of death – survived by spouse or children?) are contained in sections 35 through 40 of the Act. Section 40 provides –

“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 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 section 35 to 38.”

3. It appears therefore that whereas the judgment of the lower court was that the Deceased's property should be shared as provided for under section 40 of the Act, the court unwittingly appeared to curtail that section by purporting to give to the two widows of the Deceased (who were the petitioners) a life interest only. This was an error on the face of the judgment.

4. The judgment of the lower court was appealed to the High Court at Nyeri which heard and dismissed the appeal. It further directed that the grant in the lower court be confirmed in accordance with the judgment of that court. The High Court did not correct the error I have just

pointed out.

5. The Deceased herein was polygamous. Both his widows have children. The Applicant is one of them. Her complaint is that she was left out of the distribution. But I have keenly perused the lower court record. The grant has never been confirmed as directed by the High Court in *Nyeri HC Civil Appeal No. 33 of 2000*. The last entry in the lower court record is that a date for confirmation of grant was taken on 23/06/1999. That date was 14/07/1999. However, the grant was not confirmed on that date. The court directed that a date for confirmation of grant be taken in the registry.

6. In these circumstances, I must refuse the summons for revocation of grant as the same is premature. I will direct that the lower court record be taken back to that court for purposes of confirming the grant. Distribution of the estate of the Deceased (who was polygamous) shall be strictly in accordance with section 40 of the Law of Succession Act. The part of the lower court judgment purporting to limit that section by granting the widows a life interest only is hereby struck out. It is so ordered.

7. Parties shall bear their own costs of these proceedings.

DATED AND SIGNED AT MURANG'A THIS 16TH DAY OF FEBRUARY 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 17TH DAY OF FEBRUARY 2016