



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 195 OF 2012

IN THE MATTER OF THE ESTATE OF MAGAMBO KIARA – DECEASED

DEADAN KIMATHI MAGAMBO.....1ST PETITIONER

ELIPHAS KAARIA.....2ND PETITIONER

VERSUS

GRACE DAVID.....1ST PROTESTOR

PHILLIS KATHUGUCHI MAGAMBO.....2ND PROTESTOR

PHINEAS KIBAARA.....3RD PROTESTOR

GITONGA MAGAMBO.....4TH PROTESTOR

JUDGMENT

1. The Petitioner **DEDAN KIMATHI MAGAMBO** and **ELIPHAS KAARA** were issued with grant of letters of Administration intestate on 8th January 2013 and sought confirmation of the grant through summons for confirmation of granted dated 24th September 2013. In support of their application they sought the state to be distributed as per their affidavit of support dated 24th September 2013. They sought land parcel **Egoji/Kiangua/968** and **Egoji/Kiangua/101** be distributed unequally amongst the deceased sons, and widow.

2. The Petitioners mode of distribution provoked, Grace David, Phillis Kathuguchi Magambo, Phineas Kibaru and Gitonga, Magambo to file their joint affidavit of protest, urging the deceased was survived by 7(seven) beneficiaries and proposed L.R. No. Igoji/Kiangua/968 and Igoji/Kiagua/101 be shared equally amongst all beneficiaries save Phillis Kathuguchi Magambo who was to get almost ½ of what others were to get.

3. The court gave direction that the protest be determined by way of oral evidence. The parties agreed that the issue for determination was as follows:-

(a) How should the deceased's estate be shared amongst the 7 beneficiaries in respect of the deceased assets namely: L.R. Igoji/Kiangua/968 and Igoji/Kiangua/101?

4. The Protestors gave evidence in support of their protest through three (3) witnesses whereas the petitioners called five (5) witnesses.

5. **OW1 Grace David Kirimi** testified that Phillis Kathaguchi is her mother, Phineas Kibaara and Gitonga Magambo are her brothers-in-law by virtue of having married their brother David Kirimi (deceased). That the petitioner David Kimathi Magambo is also her brother-in-law. She testified that the deceased Magambo Kiara, who died on 6.5.1992 had two parcels of lands Nos. Igoji/Kiangua/101 comprising of 2 hectares and Igoji/Kiangua/968 comprising of 1.4 hectares. That the deceased had one wife Phillis Magambo and 10 children. She gave the names of the children as follows:-

- a. *Eliphas Kaaria.*
- b. *Dedan Kimathi.*
- c. *Phineas Kibaara.*
- d. *Leonard Gitonga Magambo.*
- e. *David Kirimi (deceased).*
- f. *John Gikundi.*
- g. *Rose Kanyua.*
- h. *Silvia Karitho.*
- i. *Mugure.*
- j. *Mukwa Mwethaya (deceased).*

OW1 testified the deceased daughters are not entitled to share as they are married. She prayed that the land be shared equally amongst 7 (seven) beneficiaries excluding deceased daughters. During cross-examination OW1 stated the land had not been shared before the deceased passed on.

6. **OW2, Phineas Kibaara** adopted the evidence of OW1. He stated that John Gikundi, son of Ndege Magambo should get a share of the deceased's land. He stated the land should be shared equally among 7 people.

7. **OW3 Gitonga Magambo** adopted the evidence of OW1 and OW2 stating he did not want to add anything else.

8. **PW1 Eliphas Kaaria Magambo** testified that the deceased was his father and he died in 1981 and that Phillis is his mother. That the deceased estate comprised of Igoji/Kiangua/101 and 968 all in all being 3.52 acres. He supported the scheme of distribution by Dedan Kimathi Magambo dated 24.9.2013. He testified that Elphas had been shown his own portion. PW1 testified he is settled on plot No.101, but has both plots. He stated they have boundaries for their respective portions stating most of the land was subdivided in 1971 according to their works. During cross-examination PW1 testified that the deceased shared the land but not equally. He stated that his father had 10 children but when he petitioned for the grant he did not get their consent. He admitted the daughters were not included nor provided for.

9. **PW2 Dedan Kimathi Magambo** testified he filed an application for confirmation of the grant dated 24.9.2013. He stated his mode of distribution is based on estimate. He confirmed all beneficiaries are settled on plot No. 101. He urged the court to distribute the estate considering the developments of each of the beneficiaries.

10. **PW3 John Mugania**, nephew to the deceased, testified the deceased had 6 sons and 4 daughters and that during his lifetime he shared his land amongst his sons in his presence but he cannot remember the date. He stated the daughters were not given any share. He stated all the deceased's sons use the land save his grandson John Gikundi, son of Ndege Magambo whose portion is used by Phineas Kibaara.

During cross-examination PW3 admitted the sons of the deceased herein did not get their land transferred into their names. He admitted all sons of the deceased should have equal shares of land.

11. **PW4 Munene Mukendia** testified the deceased had 6 sons and 4 daughters. That before his death he shared his land amongst his children excluding daughters.

12. **PW5 Mwiyeendi Ngairi**, testified that the deceased had 6 sons and 4 daughters and that he shared his land before his death and did not give any portion to his daughters. He testified he was not there when the land was shared.

13. The Court before the case was closed summoned the deceased's daughters who had not been served with the pleadings to attend court and indicate to the court their position. One **Margaret Mugure** attended court and stated she was not interested in getting any share of the deceased's estate, **Rosemary Kanyua** sought a share of the deceased's estate but **Phillis Kathugochi Magambo** the widow of the deceased did not attend any of the hearings.

14. I have carefully considered the pleadings, the parties evidence and that of their witnesses. The main issue for consideration, is how the deceased's estate should be distributed.

15. All the Protestors and Petitioner are children of one mother, **Phillis Kathugochi Magambo**, the only wife of the deceased herein. The deceased according to the evidence had one wife, 6 sons and 4 daughters. The Petitioners did not list all the deceased's children in this cause but omitted to include the deceased daughters, nevertheless it has come out from the evidence of the Protestors and that of the Petitioners, that the deceased was survived by his wife and 10 children two of whom are deceased. That Mukwa Murethoya was said, to be deceased and no evidence was given to state whether she was married or not and whether she had children or not. I have weighed evidence on sharing of the deceased estate during his life time and find that there is no evidence to support petitioners contention that the land was shared during the life time of the deceased as no documentary evidence was produced or title or mutation forms. I agree with the Protestors that the deceased herein did not share his lands during his life time but he allowed his sons to occupy and develop different portions.

16. **Section 35(1) (a) (b) of the Law of Succession Act** Provides:-

“1(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to:-

(a) the personal and household effects of the deceased absolutely;

and

(b) a life interest in the whole residue of the net intestate estate.”

17. **Section 38 of the Law of Succession Act** Provides:

“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 be equally divided among the surviving children.”

18. In the case of **Stephen Gitonga M'Murithi V. Gerith Ngira Murithi Civil Appeal No. 3 of 2015 (Nyeri)** the Court of Appeal addressed itself thus:

“ the clear principles of law enshrined in Section 38 and 40 of the law of succession Act Cap 160 of Succession Act Cap 160 Laws of Kenya. Section 38 enshrined the principle of equal distribution of the net estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried. Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each household

of the polygamous deceased estate.”

----- in the circumstance of the case having found that the principle in Section 38 was the appropriate applicable principle, and having a life interest would have only bestowed upon the widow Naomi a hovering interest over the individual interest of all other beneficiary thereby making it impossible for all beneficiaries to enjoy freely the resulting benefits from the deceased's estate.”

19. I therefore find and hold that all the deceased properties thus L.R. Nos. Igoki/Kiangua/968 and Igoji/Kiangua/101 forming the net estate of the deceased subject of this protest should be distributed equally amongst all the deceased sons, daughters and the widow of the deceased rather than her (**widow**) getting life interest in view of the fact that, the properties comprises of agricultural lands from which one can only get income by working on the land and/or disposing of the same and by giving the widow life interest will tie the benefits that the sons and daughters may get while the widow at the same time gets no tangible benefit as she is old and is not able to work on the land to get any income. The daughters who would not get share or benefit from the deceased estate are **Mukwa Mwethaya** (deceased) as no evidence of her having beneficiaries was tendered and **Margaret Mugure** who appeared before the court and stated she was not interested in any share from the deceased's estate. I therefore order the following children of the deceased and deceased's widow to get equal share in respect of the said estate thus:-

- a. Eliphas Kaaria.*
- b. Dedan Kimathi.*
- c. Phineas Kibaara.*
- d. Leonard Gitonga Magambo.*
- e. Grace David Kirimi (widow to David Kirimi).*
- f. John Gikundi (grandson to the deceased in respect of share of Ndege Magambo) his father)*
- g. Rose Kanyua.*
- h. Silvia Karitho.*
- i. Philis Kathuguchi Magambo(widow to the deceased herein)*

The distribution to take into account the developments of each of the beneficiaries.

20. That as this matter involves sons, daughters and widow of the deceased, each party to bear its own costs.

DATED THIS 19TH DAY OF JULY, 2016.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT AT MERU THIS 19TH DAY OF JULY, 2016.

In the presence of:

Protestors in person

Petitioners in person

BY FRANCIS GIKONYO

JUDGE

ON BEHALF OF:

J.A. MAKAU

JUDGE