



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO 599 OF 2012

In the Matter of the Estate of Robert Mbogori Rutere (Deceased)

JULIA GACERU M'BAGINE.....PETITIONER

VERSUS

JUSTUS MWORIA.....1ST PROTESTOR

RUTH KAROGOTO RUTERE.....2ND PROTESTOR

RULING

Protest: Property not estate property

[1] In this case, there are two Protestors; each of the Protestors filed an affidavit of Protest sworn on 21st August, 2014. The 1st Protestor is the brother to the deceased and the 2nd Protestor is their mother. The protests are substantially the same and I will deal with all the issues therein together. After hearing the counsels for the parties, this court directed that the Protests dated 21st August 2014 shall be disposed of through written submissions. The parties filed submissions which I shall also consider. The gist of the Protests herein is that, although L.R NO. NYAKI/GIAKI/KIBURINE/45 (hereafter referred to as the suit land) is registered in the name of the deceased; it does not belong to him but to the late Samuel M'Rutere M'Ithuu- the husband of the 2nd Protestor and father to the deceased and the 1st Protestor. They urged that the said late Samuel M'Rutere M'Ithuu solely acquired the suit land from the settlement scheme but had it registered in the name of the deceased. The Protestors further averred that the 1st Protestor was asked by his late father to move into this land in 1980 – before the Petitioner was married by the deceased in 1983- and he has since occupied, developed and cultivates about 13 acres of this land. They argued that the Petitioner on the other hand, has been leasing out the remaining portion of the land to third parties. The 1st Protestor specifically stated that there are clear boundaries on the land which show the use of the land by each party and that this can be verified by a visit in quo of the land. The following are the developments the 1st Protestor claims to have carried out on the land;

- a) Permanent house;
- b) Kitchen;
- c) Bananas;
- d) Miraa;

- e) Electricity;
- f) Gravelier and other types of trees;
- g) Pawpaw;
- h) Piped water supply; and
- i) Livestock;

Accordingly, this being his father's land he says that he is also entitled to a share thereto. He also stated that his late father had acquired other lands but which are not subject of any dispute.

[2] In addition, the Protestors contended that they, the brothers and sisters of the deceased were not consulted by the Petitioner when she filed these proceedings. Yet they have a right to apply for letters of administration. They asserted that they only learnt of these proceedings when they applied for the chief's letter for purposes of filing a succession cause in respect of his father's estate. Accordingly, they urged the court to exercise its final discretion under section 66 of the Law of Succession Act and determine the person to whom to grant letters of administration should be made in the best interest of all the parties concerned. They beseeched the court to find that the Protestors are entitled to a share in the suit land and that the Petitioner is not in priority over them as alleged. The 1st Protestor was categorical that, unlike the Petitioner, he did not intend to deprive the Petitioner of her rightful share in the estate. He deposed that the Petitioner and he have been involved in a tussle on this land since 2008 and has been having a criminal case with the family of the Petitioner at Giaki Police. He requested that confirmation should not be granted before his protest is heard.

Petitioner says land is estate property

[3] The Petitioner firmly stated that the suit land was acquired solely from the settlement scheme by the deceased and was never acquired by their late father at all or ancestral land or held in trust for anybody; she stated that the deceased was registered in 1977 as and is the sole absolute and indefeasible owner of the suit land. The Petitioner stated further that their late father died intestate in 1994 and the suit land was never part of his estate. She saw some significance in the fact that the deceased died 10 years after their father and nobody made a claim on the suit land. She said that she was careful not to include in these proceedings the properties belonging to the estate of the late Samuel M'Rutere M'Ithuu father of the deceased as those are being dealt with in Meru Succession Cause No. 540 of 2012; and that in those proceedings she will claim the deceased's share in that estate. She drew the attention of the court to the fact that the 2nd Protestor is the Petitioner in the said cause number 540 of 2012 but she did not list the suit land as one of the properties of the estate of the late Samuel M'Rutere M'Ithuu; a matter she described as height of dishonesty and a blemish to the protests herein. According to the Petitioner, the suit land only forms part of the estate of the deceased to which, as the surviving spouse she is entitled as a dependant under section 29. She also stated that under section 66 she has priority to apply for letters of administration of the estate; and to inherit the suit land together with her children under section 35 of the Law of Succession Act. As such, she was convinced that the Protestors do not have any right on the suit land and are just trying to disinherit her and her children of the suit land on the basis of custom and customary traditions that a widow should never take charge of the property of her deceased husband. She contended that the 1st Protestor is intermeddling with the estate property and despite repeated demands for him to vacate he has flatly refused and has engaged in machinations to stay on the suit land. She concluded that the Protestor being on the land or the fact that she has not been living on the land does not make the Protestor the owner of the suit land. In fact, she averred that the 1st Protestor by putting illegal boundaries does not confer upon him any right over the suit land. On the basis of the above, she urged the court to dismiss the protest.

DETERMINATION

Issues

[4] From the pleadings and arguments by parties herein, I am can decipher the issues I am called upon to determine to be:

(1) Whether the suit property is part of the estate property; and

(2) Whether the Protestors are entitled to letters of administration to the estate herein and or a share of the suit property?

Whether suit land is estate property

[5] Much has been put forward about the suit property especially by the Protestors to the effect that it belonged to the late Samuel M'Rutere M'Ithuu and not the deceased herein. The Protestors argued that the court should find that the suit land belonged to the late Samuel M'Rutere M'Ithuu, and therefore, they have a share in it as the son and widow of the said late Samuel M'Rutere M'Ithuu, respectively. But, despite these arguments by the Protestors, one thing is not in doubt; that the deceased is the registered absolute owner of the suit land. The Protestors made bare statements without any proof that the suit land was acquired by the late Samuel M'Rutere M'Ithuu from the settlement scheme. For sure, such Schemes by government operate on record which I expected the Protestors to produce in order to back their claims. But they did none of that. What is even more perturbing is that there is an existing cause in respect of the late Samuel M'Rutere M'Ithuu which is MERU SUCCESSION CAUSE NO 540 OF 2012; it has been said that the suit property is not been listed as one of the estate property in those proceedings. That is a substantial consideration that affects the veracity of what the Protestors are saying. That notwithstanding, the Protestors are staking claims of ownership of the suit property; that it belongs to the late Samuel M'Rutere M'Ithuu. I have stated earlier that the deceased is the registered owner of the property and so the Protestors ought to have offered evidence which would impel the court to find a trust but none was forthcoming. In any event, the argument by the Petitioner that the late Samuel M'Rutere M'Ithuu died ten year earlier before the deceased and that these Protestors did not stake any claim on the land in any court of law makes sense. To me, such are matters of ownership of property which should have been resolved as such in the right forum. This position does not change and the fact that the dispute is between estates of two deceased persons does not give it any different complexion from land ownership dispute which I believe should be determined by the Environment and Land Court. I am aware that one may argue that these matters are of succession calibre falling within the jurisdiction of this court. But it bears repeating that the dispute to be resolved is not per se among the beneficiaries of any of the estates but one of ownership of land between the administrators of two different estates- resolution of such issue cannot be attained through a protest in this cause or in the other cause that relate to the estate of the late Samuel M'Rutere M'Ithuu but in a case between the administrators. Again, I must repeat that the deceased is the registered owner of the suit property; in law he is recognized as the owner. In addition, and I said this earlier, the other estate of the late Samuel M'Rutere M'Ithuu does not claim the suit property to be the property of that estate. Therefore, mixing these two estates in a protest will not only be contrary to the law of succession but will be like entangling wool and then, expect the court to do the most untidy job of disentangling it- what a herculean if not impossible task that would be? For purposes of this succession cause, it is sufficient that the deceased is the registered owner of the suit property. Accordingly, in the absence of a pronouncement or evidence to the contrary, I find and hold that the suit land forms part of the estate property. I will proceed on that basis to determine whether the Protestors are entitled to a grant of letters of administration at all or in equality with the Petitioner?

Hierarchy in applying for letters of administration

[6] Are the Protestors entitled to a grant of letters of administration and or a share in the estate of the deceased? Very subtle arguments were advanced on the order of priority for purposes of appointment of administrators in an intestate estate. But parties cannot agree, thus, the court should have the final discretion to appoint the administrator of the estate except, it must be guided by defined legal principles on the subject. The considerations for the exercise of this discretion include; (1) the general guiding order of preference provided in section 66 of the Law of Succession Act in respect of wholly intestate estate;

(2) the right and priority of beneficiaries according to their respective interests provided in PART V; and
(3) the best interest of all parties concerned which will be derived from the overall impression on the circumstances of the case. Under section 66, the surviving spouse or spouses with or without association with other beneficiaries have the first preference in law to a grant of letters of administration intestate. Provided, where there is partial intestacy, letters of administration shall be granted to any executor or executors who prove a will. This case relates to an estate that is wholly intestate. I will, therefore, consider the surviving spouse as the person with first priority. I must, however, state that spouse here means the widow or widows or widower of the deceased person. I say this because there are tendencies in some traditions to discriminate against the widow in inheritance especially of land and landed property- which has no place in the wake of the new Constitution- and I have used the term new Constitution deliberately to demonstrate new dawn of live consciousness which treats all human beings, male or female alike equal in the eyes of the law. I am glad the Court of Appeal has now rendered itself in no uncertain terms that the Law of Succession Act, customs, practices and traditions on inheritance must now bow to the Constitution and embrace the principle of equal distribution to all children of the deceased and the right to apply for letters of administration regardless of gender, whether married or not or whether comfortable in the marriage or not. And in light of such clear command by the Constitution and case law, it would be pretentious in modern Kenya to say you are or to act ignorant that discrimination of any form against a person on the basis of gender is prohibited discrimination. See the Court of Appeal case of **JUSTUS THIORA KIUGU & 4 OTHERS vs. JOYCE NKATHA KIUGU & ANOTHER eKLR**. Now, therefore, in light of my holding that the suit property forms part of the estate property, and in the absence of any special factors such as grave unsuitability, I find and hold that the Petitioner being the surviving spouse of the deceased has preference over the Protestors in the grant of, and rightfully holds the letters of administration in respect of this estate. See also the cases of **Re KIBIEGO [1972] 179** and **Re ESTATE OF WAWIRA [2000] KLR 12**.

[7] In the premises, I find the two protests not to have merits and I accordingly dismiss them. I have perused the file and I do seem to see any application for confirmation of the grant. Accordingly, I direct the Petitioner to apply for confirmation of the grant of letters of administration intestate within 30 days from today. It is so ordered.

Dated, signed and delivered in open court at Meru this 16th day of August 2016

F. GIKONYO

JUDGE