



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION – MILIMANI COMMERCIAL COURTS**

**SUCCESSION CAUSE NO. 565 OF 2014**

**IN THE MATTER OF THE ESTATE OF JAMES MUTEMBEI BROWN (DECEASED)**

**JOSEPHINE GATIIRIA MUTEMBEI.....PETITIONER**

**VERSUS**

**DENNIS MURANGIRI MUTEMBEI.....PROTESTOR**

**RULING**

The deceased in this matter died intestate on the 29<sup>th</sup> December 2010.

Josephine Gatiiria Mutembei who is the deceased’s wife and Denis Murangiri Mutembei the deceased’s son petitioned the court for Grant of Letters of Administration intestate on the 11<sup>th</sup> March 2014. On the 27<sup>th</sup> April 2016 an Application for Summons for confirmation of Grant and an affidavit in Support of that Application was filed in court proposing the mode of distribution of the estate and the beneficiaries entitled to each share of the estate. One of the Administrators Denis Murangiri Mutembei did not sign the Affidavit in Support of Summons for Confirmation. He filed an affidavit of protest

In the Petition for Letters of Administration the following were named as his survivors;

<b>Josephine Gatiiria Mutembei</b>	<b>Wife</b>	<b>46 Years</b>
<b>Denis Murangiri Mutembei</b>	<b>Son</b>	<b>26 Years</b>
<b>Sherie Gakii Mutembei</b>	<b>Daughter</b>	<b>18 Years</b>
<b>DBM</b>	<b>Son</b>	<b>14 Years</b>
<b>NK</b>	<b>Daughter</b>	<b>8 Years</b>

They also made a full inventory of all the assets that had been acquired by the deceased at the date of his death.

**1. LAND REFERENCE [Particulars Withheld] -PLOT A295 [Particulars Withheld] to Josephine Gatiira Mutembei Absolutely**

**2. TASSIA-[Particulars Withheld] (NSSF)** to Josephine Gatiiria Mutembei for her lifetime interest and thereafter to the children namely Denis Murangiri Mutembei Sherie Gakii Mutembei DBM and NK in equal Shares

**3. KWA NDEGE II DEVELOPMENT PROJECT EMBAKASI PARCEL NO.** [Particulars Withheld] to Josephine Gatiiria Mutembei for her lifetime interest and thereafter to the children namely Denis Murangiri Mutembei Sherie Gakii Mutembei, DBM NK in equal Shares

**4. VIGILANT DEVELOPMENT YOUTH GROUP PLOT NO.** [Particulars Withheld] to Josephine Gatiiria Mutembei for her lifetime interest and thereafter to the children namely Denis Murangiri Mutembei Sherie Gakii Mutembei DBM, NK in equal Shares

**5. JORSIM JUA KALI SELF HELP GROUP PLOT NUMBER NO.**[Particulars Withheld] to Josephine Gatiiria Mutembei for her lifetime interest and thereafter to the children namely Denis Murangiri Mutembei Sherie Gakii Mutembei DBM, NK in equal Shares

**6. MUKURU IMARA SQUATTERS SETTLEMENT SCHEME SELF HELP GROUP PLOT NUMBERS** [Particulars Withheld] to Josephine Gatiiria Mutembei for her lifetime interest and thereafter to the children namely Denis Murangiri Mutembei Sherie Gakii Mutembei DBM,NK in equal Shares

**7. EQUITY BANK ACCOUNT** [Particulars Withheld] –**DONHOLM BRANCH** to Josephine Gatiiria Mutembei Absolutely

**8. SHARES IN HARAMBEE SACCO-MEMBERSHIP NUMBER** [Particulars Withheld] to Josephine Gatiiria Mutembei Absolutely

**9. MOTOR VEHICLE** [Particulars Withheld] to Josephine Gatiiria Mutembei Absolutely

**10. EX-KA LAND ROVER** to Josephine Gatiiria Mutembei Absolutely

## **HEARING**

During the hearing on the 31<sup>st</sup> August 2016 Denis Murangiri one of the administrators and a son to the deceased testified that he is the first son of the deceased and his mother is Consolata Karimi who is deceased. He informed the court that he is an administrator of the deceased's estate.

He was of the view that the administration of the estate was not equitable and he had not been given his fair share of his deceased father's estate. There were no consultations as administrators of the estate. He is not aware of other properties of the deceased that are not disclosed.

All the property of the deceased's estate is held by the 1<sup>st</sup> Administrator widow of the deceased in trust for herself in life interest and then jointly for all children. He is an adult aged 26 years old and lives alone fending for himself, yet his stepmother and her children reside in the matrimonial home. He wishes to continue with his education. He would like his beneficial interest and share hived from the rest of the estate so as to meet his needs and to pay his school fees.

He stated that the first administrator is his stepmother. He joined the family of the deceased in 2004 after he completed secondary school and has been living with them until his father died. His late father paid his school fees in College but that stopped after his death. He did not know of the rest of the properties listed and he could not tell where they were located either. He also wanted a share of the matrimonial home as it was the property of his late father. He wants the properties valued and distributed equally among the beneficiaries.

Josephine Gatiiria Mutembei testified that she was the widow of the deceased and that they were married in 1993 and were blessed with three children. The deceased informed her that he had another child

outside the marriage and the child lived with his mother. The Protestor joined them and lived with them in 2004.

In 2004 the Protestor did not do well in his exams and he repeated a year in 2005 and 2006 and he was out of school and stayed with his family. The deceased asked him to join to join a college and in 2009 he joined Kenya Institute of Business Technology in 2009 for a three year course. The witness advised the Protestor to get a job on attachment basis for 3 months and he felt that since he was not getting paid, he left. She later got him another job at Uchumi Supermarket and he was there for 1 month and he left. The witness suggested the Protestor joins another educational institution. She realized he was of age and she decided to give him his space and he moved out of the matrimonial home.

The witness testified that she started off as a high school teacher and she and the deceased had saved and built their home together. They acquired a few plots to enable them to take care of their family and also to ensure they were not a burden to anyone when they grew old. The witness went on to say that at the time of the deceased's death he had been planning on retiring from service. According to the witness the protestor had sent someone to the Caretaker of one of the plots. Therefore she did need to disclose any other matter regarding the deceased's assets as he was already involved. The witness contested the fact that the protestor was asking for a share of the matrimonial home and equal share of the deceased's estate. She stated she contributed her own funds and obtained loans to help build the matrimonial home. She continued to develop it further after the deceased's death and therefore the Protestor is not entitled to the said share from the matrimonial home. Secondly, she has school going children who rely on her individual effort to feed, clothe and provide education from the resources that form part of the estate of the deceased. The Court ought to take into account these factors in determining the distribution of the deceased's estate.

## **ISSUE**

What share of the Deceased's estate is the protestor entitled to?

## **DETERMINATION**

The Law makes provisions for the dependants of the deceased's estate including wives and children. In the Affidavit of Summons for Confirmation of Grant filed by the Applicant, Josephine Gatiiria Mutembei, is to acquire Equity Bank Account [Particulars Withheld] –Donholm Branch, Shares in Harambee Sacco-membership number [Particulars Withheld], Motor Vehicle [Particulars Withheld] and Ex-KA Land Rover absolutely. The rest of the property listed in the affidavits she is to hold in trust with a life interest to be divided equally among the four children.

The Protestor is against this proposal as stipulated in the affidavit of protest filed on 23rd June 2016. He stated that he did not sign the Summons for Confirmation of grant as he was not consulted or involved. During the hearing he testified that he would like the property divided and he wants to be given his share. As an adult and an undisputed son of the deceased the law makes provisions for his share in the deceased's estate.

## **LAW**

**Section 26** of the **Law of Succession Act** provides:

***Where a person dies after the 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, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law make a reasonable provision for that dependant, order that such reasonable provision as the court deems fit shall be made for that dependant out of the deceased's net estate.***

The protestor is son to the deceased. He confirmed during his father's lifetime, his father paid his school

fees and expenses and he lived with him and the step family in the matrimonial home which he left when the deceased died. He is a beneficiary of his estate and /or dependent. He is entitled to reasonable provision from his late father's estate. He is an adult of 26 years and wishes to have his share in his deceased father estate devolved to him.

Similarly, **Section 35** of the **Law of Succession Act** provides;

***(3) where any child considers that the power of appointment under section (2) has been unreasonably exercised or withheld ,he or, if a minor his representative may apply to the court for the appointment of his share (4) Where an application is made under subsection (3) the court may award the Applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made and if so what order, shall have regard to-***

***(a) the nature and amount of the deceased's property***

***(b) any past present or future capital l or income from any source of the applicant and of the surviving spouse***

***(c) the existing and future means and needs of the applicant and the surviving spouse***

***(d) whether the deceased had made any advancement or other gift to the Applicant during his lifetime or by will;***

***(e) the conduct of the applicant in relation to the deceased and to the surviving spouse***

***(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate of the deceasedor as a beneficiaryunder his will if any and***

***(g) the general circumstance of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did and any other application made under this section***

The 1<sup>st</sup> Administrator proposed the best way is that she holds the estate in life interest and in trust for all children. This she explained is because she has financial obligations and responsibilities, especially the 3 children are young and school going and this is costly. She has to bear this burden single handedly. On the other hand the stepson is an adult already he has completed education and he fends for himself.

I have considered the evidence on record and submissions by each administrator. I am inclined to determine this matter based on law outlined that the Protestor is son to the deceased, is a beneficiary and was dependent on the deceased. Therefore he is entitled to beneficial interest in the deceased's estate. The fact of his share of the estate being held in a trust by the widow of deceased in life interest is not plausible as he is an adult. If he waits for the 1<sup>st</sup> administrator's life interest to expire and then share the estate amongst his younger siblings, he might not live to use and enjoy the beneficial interest of the deceased's estate. The Protestor and 2nd family of the deceased do not seem amiable to each other, so it is possible that working together might be a problem. Secondly, the protestor lives away from the 2nd family and it will be cumbersome to have meetings on this matter. Thirdly, the children of the 2nd family are much younger than the protestor that to wait until they are all adults to distribute the estate is unfair and unrealistic to the Protestor. In light of these circumstances and what the law provides; I am of the view that the Protestor's beneficial interest in the deceased's estate be hived off and be released and or to transferred to his name and for his use or disposal. Taking into account that the Petitioner has been employed during her marriage to the deceased, it is reasonable to conclude that she made contribution to acquisition of the estate of the deceased. There is also the issue of the fact that the Protestor is one child of the deceased and there are 3 other children and the deceased's widow who all rely on the said estate for their livelihood.

**DISPOSITION**

**Due to the above analysis of evidence on record and the law, I grant following orders;**

**1.The matrimonial home shall remain with the 1<sup>st</sup> Administrator and her children jointly and equally. This is because she led evidence that they bought and built the house with deceased. By the time he died, the house was not complete, she had to borrow money to make the house habitable.**

**2.The money in the bank and shares shall be distributed to the widow administrator absolutely to service loans and ensure upkeep of the children.**

**3.The motor vehicles shared equally between the 2 administrators or proceeds thereof.**

**4.Of the 4 remaining immovable properties, the 1<sup>st</sup> Administrator shall surrender one of them and transfer to the 2<sup>nd</sup> administrator for his use and or disposal.**

**5.The parties can then amend or file summons for confirmation for approval within 90 days from today.**

**6.Each party to bear its own costs.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 26<sup>TH</sup> SEPTEMBER 2016**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

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