



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 560 OF 2015

(FORMERLY MERU SUCCESSION CAUSE NO. 253 OF 2014)

IN THE MATTER OF THE ESTATE OF M'MUTHAMIA MWENDWA (DECEASED)

PAUL KAMUNDI JOTHAM.....PETITIONER/APPLICANT

VERSUS

JANET IGOKI.....1ST INTERESTED PARTY

PRISCA NCURUBI.....2ND INTERESTED PARTY

JENEROSA KANYAMU.....3RD INTERESTED PARTY

MARGARET WANJA.....4TH INTERESTED PARTY

LINUS MWITI.....5TH INTERESTED PARTY

J U D G M E N T

1. M'Muthamia Mwendwa (hereinafter "*the deceased*") died on 2nd April, 1995. He left behind a property known as Abogeta/U-Kiungone/1680 as his estate. He was survived by a son, four (4) daughters and nine (9) grandchildren. This was disclosed in a letter dated 15th September, 2014 by the Chief of Abogeta Location. In that letter the Chief also indicated how the family had agreed to distribute the estate and that Paul Kamundi, the Petitioner had been chosen to petition for Letters of Administration.

2. Pursuant thereto, on 11th December, 2014 Paul Kamundi Jotham petitioned for letters of administration intestate whereby a grant was issued to him on 2nd April, 2015. On 29th March, 2016, he applied for the confirmation of that grant. In that application, he proposed that the estate be distributed as follows:-

(a) LR ABOGETA/UPPER KIUNGONE/1680

- i. Paul Kamundi Jotham - 2.50 Acres to hold in trust himself and his daughters namely:-
 - Sparenza Nkirote
 - Nancy Mukami

				-	Martha	Gakii
				-	Winnie	Murugi
				-	Martin	Mwirigi
ii.	Lucy Kawira			-	1.30 Acres to hold in trust for herself and her children namely:	
				-	Pamela	Mwendwa
				-	Sharon	Gaitugi
				-	Onesmus	Mutura
iii.	Sparenza Kaguri			-	0.40 Acres to hold in trust for herself and her children namely:-	
				-	Purity	Kagendo
				-	Samwel	Murithi
iv.		Elosy			Kathambi	
	Linus	Mwiti	Paul	-	0.65	Acres Jointly
v.	Linus	Mwiti		-	0.86	Acres
vi.	Edward	Muriungi		-	1.30	Acres
vii.	John	Mutembei		-	0.25	Acres
viii.	Francis	Kithinji		-	0.44	Acres
ix.					Janet	Igoki
		Prisca			Ncurubi	
					Jenerosa	Kanyamu
	Margaret Wanja			-	0.50- jointly	

3. On the same day, Janet Igoki, a daughter of the deceased filed another application for confirmation of grant making a different proposal on how the estate should be distributed as follows:-

a) LR ABOGETA/UPPER KIUNGONE/1680

i.	Paul Kamundi Jotham			-	1.30 Acres to hold in trust for himself and his daughters namely:-	
				-	Sparenza	Nkirote
				-	Nancy	Mukami
				-	Martha	Gakii
				-	Winnie	Murugi

ii.	Martin	Mwiri	-	1.00	Acre
iii.	Lucy Kawira	-	1.30 Acres to hold in trust for herself and her children namely:		
		-	Pamela		Mwendwa
		-	Sharon		Gaitugi
		-	Onesmus		Mutura
iv.	Sprenza Kaguri	-	1.05 Acres to hold in trust for herself and her children namely:-		
		-	Purity		Kagendo
		-	Samwel		Murithi
			- Elosy Kathambi		
v.	Linus	Mwiti	-	0.86	Acres
vi.	Edward	Muriungi	-	1.00	Acre
vii.	John	Mutembei	-	0.25	Acres
viii.	Francis	Kithinji	-	0.44	Acres
ix.		Janet			Igoki
		Prisca			Ncurubi
		Jenerosa			Kanyamu
	Margaret Wanja	-	1.00 Acre-		jointly

4. Further, on 12th May, 2016, Linus Mwiti Paul filed a protest in which he supported the distribution proposed by the Petitioner. The Advocates for the parties filed their submissions in support of their respective client's cases.

5. It was the submission of Mr. Mugo for the Petitioner that the grandchildren of the deceased who were set out in the application for confirmation were dependants of the deceased and were therefore entitled to a share in the estate under section 29 of the Law of Succession Act, Cap 160 Laws of Kenya (hereinafter "*the Act*"). That the proposal by Janet Igoki (hereinafter "*the Protestor*") was unacceptable as it did not reflect the agreement reached by the family on distribution. That the daughters of the deceased were happily married in their homes and the proposal to increase the share allocated to them by the Petitioner sought to affect two beneficiaries Edward Muriungi and Paul Kamundi, respectively. That in any event, initially the deceased's intention was to vest the entire property on the Petitioner as per the documents from the Land Control board wherein he had intended to transfer the entire portion to him. Counsel therefore urged the court to uphold the Petitioner's proposal. Mr. Mutani for Linus Mwiti Paul submitted that, the Petitioner's proposal was preferable as it was in tandem with of the family agreement on distribution. That since the daughters were happily married and settled elsewhere, their claims should be disregarded. In conclusion, Counsel submitted that because of the presence of so many dependants of the deceased, there was no room for the protestor's proposal and the same should be rejected.

6. On her part, Ms Kaaria for the Protestors disagreed with her colleagues. She submitted that section 29 of the Act, gives the order of priority of dependents. That under the said section, the children of a deceased person in this case the son (Petitioner) and four daughters (the Protestors), rank in priority. That

the grandchildren are secondary in priority. That there was no evidence to show that the grandchildren listed by the Petitioner were dependants of the deceased in terms of section 29 of the Act. That the purchasers had purchased their portions from a beneficiary and a son of the Petitioner and they should not run in priority to the Protestors who are daughters of the deceased. Counsel further noted that under Article 27 (3) of the Constitution, the Protestors should not be discriminated upon on the basis of their gender. She observed that the documents from the Land Control Board were made after the demise of the deceased. Counsel concluded that the Protestors were only asking for one (1) acre and the rest of the seven and a half (7.50) acres was to be left to the Petitioner, his children and grandchildren. She urged the court to uphold the Protestors mode of distribution.

7. This court has carefully considered the Affidavits on record and the submissions for Counsel. Save for Ms Kaaria, the other Counsels did not frame the issues for determination. However, upon considering the affidavit evidence on record and submissions of learned Counsel, the following are the issues that fall for determination.

- a) Who are the beneficiaries of the estate of the deceased?
- b) Who are the dependants of the estate of the deceased?
- c) What is the position of the purchasers in the estate?
- d) Are the Protestors bound by the family agreement or are they being discriminated upon?
- e) Did the deceased intend to bequeath the Petitioner the entire of Abogeta /U.Kiungone/1680?
- f) how should the estate be distributed?

8. I should point from the outset that although the court had made an order on 12th May, 2016 that the parties file their Affidavit evidence and submissions, the parties opted to rely on the Affidavits they had filed as at that date. It is on those Affidavits that learned Counsel relied and made submissions on. Because of failure to file additional Affidavits as ordered, much of the evidence was introduced at the submission level. Of course, such evidence is irregular. However, in order to arrive at a just decision, this court will consider the entire record by virtue of Article 159 (2) (d) of the Constitution of Kenya.

9. From the record, the following were the children of the deceased:-

- a) Paul Kamundi - son
- b) Janet Igoki - daughter
- c) Margaret Wanja - daughter
- d) Jenerosa Kanyamu - daughter
- e) Prisca Ncurubi - daughter
- f) Alice Karimi - daughter (deceased)

This is discernible from the letter of introduction by the chief and the submissions of Ms Kaaria. Under section 38 of the Act, the foregoing are the ones who rank as beneficiaries as the deceased does not seem to have been survived by a wife. That section provides:

"38. Where an intestate has left a surviving child or children but no spouse, the net intestate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children"

There is no dispute as to whether the said beneficiaries are entitled to inherit, the dispute is, their shares.

10. The second issue is who the dependants are. The letter of the Chief sets out a total of seven (7) grandchildren and two granddaughters in law of the deceased. All the said grandchildren are but the children of Paul Kamundi and the granddaughters in law are the wives of his children. According to Mr. Mugo for the Petitioner, they are dependants of the deceased and therefore entitled to a share in the estate. Section 29 of the Act provides:-

"29. For the purposes of this part, "dependant" means-

a)

b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death." (Emphasis provided).

11. While considering the meaning of a dependant under section 29 of the Act in the case of **Beatrice Ciamutua Rugamba .v. Fredrick Nkari Mutegi & Others Chuka Succ. Cause No. 12 of 2016 (UR)**, the court held:-

"From the foregoing, a dependent under section 29 (b) and (c) must prove that he/she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency."

12. In the present case, there was no evidence that was led to show that any of the children of the Petitioner were being maintained by the deceased immediately before his demise. There was no evidence, and indeed it was not even suggested that the deceased had settled any of his grandsons (children of the Petitioner) on the estate land. Indeed the evidence on record shows otherwise. According to the Petitioner, through the documents produced in the submissions of his Counsel, as late of February, and April, 1995 the deceased had intended to transfer the whole of the estate land to him. If that was the intention of the deceased as contended by the Petitioner, the deceased must not have settled any of his grandsons on that land. Further to the foregoing, there was no evidence to show how the grand children were dependent on the deceased during his lifetime. In the absence of any such evidence, it will be safe to assume that their residency and occupation of the estate land was by virtue of their father's (Petitioner) interest thereon. Their right and interest on the estate land cannot be held to be independent of their father. Their interest emanates from and falls under their father's interest and claim to the estate. In this regard, other than the children of the deceased under section 29 (a) of the Act, I hold that there were no other dependants of the deceased.

13. As regards the position of the purchasers, these are neither beneficiaries nor dependants. Mr. Mugo learned Counsel for the Petitioners erroneously referred to them as dependants of the deceased. A purchaser of property from an estate of a deceased person is either an intermeddler by virtue of sections 45 and 82 of the Act or a creditor whose interest should be noted as a liability. Form No. P & A5 did not disclose the interests of John Mutembei and Francis Kithinji as a liability on the estate. If they had purchased portions of land from the deceased directly, their interest would have been noted as a liability but because they purported to purchase their portions from certain persons who held themselves as beneficiaries/dependants of the estate. These purchasers fall foul of sections 45 and 82 of the Act.

14. Courts have variously delivered themselves on the position of dealings that affect estates of deceased persons before confirmation. In the case of **Muriuki Hassan .v. Rose Kanyua and 4 Others [2014] eKLR**, when faced with a situation of sale of property belonging to an estate before succession was undertaken, **Makau J** held:-

"The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased's beneficiaries and the sale of land to them is challenged in this application. In such circumstances, the interested parties' interest cannot be considered in this matter and the remedy for them is if they would be aggrieved by final court's decision and distribution, is to file suit against the said Muriuki Musa Hassan."

15. In **Re Estate of John Gakunga Njoroge [2015] eKLR Murithi J** held:-

" A person can only deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the court to protect the estate of a deceased person is set out in Section 45 of the Law of Succession Act....."

For the transaction between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the confirmed Grant, the contracts of sale are invalid for offending the provisions of sections 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators the dealings with immoveable property of the estate is restricted by the provisions of the powers and duties of the personal representatives under Section 82(b) Proviso (ii), which provides that:-

"no immovable property shall be sold before confirmation of the grant." (Underlining mine).

16. And in **Morris Mwiti Mburugu .v. Denis Kimathi M'Mburugu [2016] eKLR**, the Court held:-

".... where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of sections 45 and 82 of the Act, that is intermeddling, is unlawful and cannot be protected by the court. The transaction is subject to be nullified and set aside at the instance of the innocent beneficiaries who may have been affected by the act but were not involved in the same." (Underlining mine).

17. According to Ms Kaaria, John Mutembei purchased a portion of 0.25 acres from Speranza Kaguri, while Francis Kithinji purchased a portion of 0.44 acres from Linus Mwiti. Of course both Speranza and Linus were neither the owners of the properties they were purporting to sell nor were they administrators of the estate. Even an administrator of the estate with a grant which has not been confirmed cannot pass any title to land by dint of section 82 of the Act. Accordingly, Francis Kithinji and John Mutembei are at best intermeddlers who together with Speranza Kaguri and Linus Mwiti have fallen foul of Section 45 of the Act. Of course under that section, intermeddling with an estate of a deceased person is criminal and it attracts criminal sanctions.

18. The next issue is whether the Protestors are bound by a family agreement which had been entered into or they are being discriminated upon. From the letter of introduction by the Chief, the family seems to have agreed to some mode of distribution of the estate which the Petitioner has sought to adopt in his application for confirmation. In that agreement, the Estate was distributed to the extent of 8.56 acres yet the estate land is 3.424 Ha, equivalent to 8.46 acres. There is nothing to show that the Protestors agreed to that mode of distribution. There is no signed agreement. Only a statement by the Chief that the family had agreed to such distribution. To my mind, the Protestors were not bound to accept a mode of distribution which they feel was prejudicial to them. There is nowhere they signed to show that they were in agreement with the proposed mode of distribution disclosed in that letter.

19. The other ground advanced in opposition to the Protestors claim to one (1) acre in the estate is that all of them are happily married and settled in their matrimonial homes. Article 27 (3) relied on by learned Counsel for the Protestors provide that:-

"27. (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres."

In the case of **Stephen Gitonga M'Murithi .v. Faith Ngira Murithi Nyeri CA No. 3 of 2015 (UR)**, the Court of Appeal delivered itself as follows:-

"The Appellant's complaint against the above mode of distribution is that it failed to take into account the clear principles of law enshrined in section 38 and 40 of the Law of Succession Act Cap 160 Laws of Kenya. Section 38 enshrines the principle of equal distribution of the net intestate 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 a polygamous deceased."

"Applying the above principles to both the learned trial Judges' reasoning and distribution, it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of Section 38 of the Law of Succession Act by discriminating against the married daughters of the deceased. See Rono versus Rono & another [2008] 1 KLR (G&F) 803."

20. From the foregoing, it is clear that a child of a deceased person is a child. There is neither male nor female, neither married nor unmarried. Indeed, section 38 of the Act talks of children being entitled to equal share in the estate. In this regard, I reject the contention that by being happily married and settled in their matrimonial homes denies the Protesters an equal share in the estate of the deceased. To hold otherwise, would be to propagate and support discriminative tendencies against our daughters and sisters in society at this time and age of new Constitutional dispensation. I reject that invitation.

21. The Petitioner contended that the deceased had intended to transfer the entire property to him before he passed on for a sum of Kshs.5000/- He relied on documents from Abogeta Land Control Board. Although the transfer form is thumb printed by a transferor named as M'Muthamia M'Mwendwa, the deceased, the same is not dated. The application to transfer that property was dated 20th February, 1995 and the letter of consent issued on 6th April, 1995 four (4) days after the deceased had died. The question that begs is, why would a father sell his property for Kshs.5000/- only while he was at liberty to bequeath it to him wholly free of charge, if he had wished it to belong to him? To this court's mind, the said documents do not prove an intention on the part of the deceased to give the entire land to the Petitioner as contended. Apart from their being suspect, they were introduced through submissions and they cannot be considered to be part of evidence

22. In view of the foregoing, how should the estate be distributed? This court has already found that those entitled to the estate are the direct beneficiaries of the estate, one (1) son and four (4) daughters of the deceased. Under Section 38 of the Act the entitlement is equal. The property in issue measures 8.46 acres. The court has already made a finding that all those who are listed as dependants are but children of the Petitioner. Their interest should and flows from their father's interest to the estate as a beneficiary. The Petitioner's mode proposes that out of the 8.46 acres he takes 7.96 acres while the four (4) daughters of the deceased take half an acre. Such a proposal inconceivable. It must prick the conscience of any court of law or equity in the face of Article 27 of the Constitution and section 38 of the Act. To my mind, the Petitioner should count himself lucky that his sisters are only asking for 1 acre instead of what section 38 of the Act decrees.

23. In view of all the foregoing, I am inclined not to disrupt the social set up now obtaining within the estate of the deceased To insist on the application of section 38 might lead to chaos as the daughters themselves are against it. I am satisfied that notwithstanding what I have held as regards the alleged dependants and the purported purchasers, I would adopt the proposal made by the protestors. Accordingly, the protest succeeds and the grant is confirmed in terms of paragraph 3 of the Affidavit of Janet Igoki sworn on 24th March, 2016.

It is so decreed.

DATED and delivered at Chuka on the 13th day of October, 2016 .

A. MABEYA

JUDGE

Judgment read and delivered in the presence of the Protestor only. Counsel absent although they had notice of the Ruling.

A.MABEYA

JUDGE

13/10/2016