



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 161 OF 2014

IN THE MATTER OF THE ESTATE OF BEN MAINA DANSON (DECEASED)

AND

L W M..... 1ST PETITIONER

M N M.....2ND PETITIONER

VERSUS

I N M.....PROTESTOR

JUDGMENT

1. This cause involves the estate of the late **B M D ALIAS G D B M** (Deceased) who died on 16th November, 2013 domiciled at Gathaka Kirinyaga County. He was survived by the following dependants:

- (i) L W M - daughter.
- (ii) M N M - daughter.
- (iii) M M M - daughter.
- (iv) G W M - daughter (now deceased)
- (v) I N M - daughter
- (vi) G M M - son (now deceased)
- (vii) M N - grandson.

2. **L W M** and **M N M** petitioned for letters of administration in this cause and were appointed joint administratrixes of the estate of **B M D** (deceased) on 24th September, 2014. The two administratrixes then took out summons dated 29th April, 2015 for confirmation of the said grant but a dispute arose among the beneficiaries on what assets comprised the estate and whether one of the listed dependants, **M N** – a grandson to the deceased was entitled to a share in the estate. According to the petitioners the following assets comprised the estate of the deceased in this cause.

(a) [particulars withheld]

- (b) [particulars withheld]
- (c) A/C No. [particulars withheld] at Equity Bank-Kagio Branch.
- (d) [particulars withheld].
- (e) Trailer, plough, jembe and a water tank.
- (f) [particulars withheld]

3. The petitioners proposed to have the estate of the deceased herein distributed as follows:

(i) [particulats withheld]

- (a) I N M – 1 acre
- (b) The remaining share to be divided equally among L W M, M N M and M M M.

(ii) [particulars withheld]

- (a) I N M – acre
- (b) The remaining share to be divided among L W M, M N M and M M M.

(iii) A/C [...] at Equity Bank. The money in the account to be used to pay school fees for M N (grandson to the deceased).

(iv) [particulars withheld]

- (a) To be shared equally among L W M, M N M and M M M.

(v) Trailer, plough jembe, water Tank

- (a) To be shared among L W M, M N M and M M M.

(vi) [particulars withheld]

- (a) To be shared equally among L W M, M N M and M M M.

4. The above proposed mode of distribution of the estate was resisted by I N M who filed an affidavit of protest sworn on 26th October, 2015 raising the following issues:

- (i) That the funds at Equity should be shared equally among all the surviving children.
- (ii) That **[particulars withheld]** does not form part of the estate of their late father as the property belonged to their late brother G M M.
- (iii) That M N (grandson) is not a direct beneficiary to the estate of the deceased and that he can only benefit from his mother's share.
- (iv) That all the other listed assets belonging to the deceased and forming part of the estate should be distributed equally among all the surviving children (4).

5. The protest filed was canvassed in court through oral evidence. The protestor tendered evidence in court in support of the protest filed and told this court that the property listed by petitioners as **L.R. No. [particulars withheld]** belonged to her deceased brother the late G M M. She also stated that she also

had her own land No. **L.R. [particulars withheld]** which she acquired courtesy of an allotment by County Council of Kirinyaga. It was her evidence that her late brother left a son known as C M who should also be given a share. She however, tendered no evidence in support of this claim. Under cross-examination, she conceded that their late father, the deceased in this cause, partly paid fees for his grandson M N but stated that their late father only did it because of compassion and due to the fact that her sister M N M was irresponsible and a drunkard.

6. On her part L W M insisted that **L.R. No. [particulars withheld]** belonged to their late father the deceased herein and produced a receipt No. [...] dated 17th October, 1974 as Exhibit 4 indicating that the receipt was issued to their late father G D B M and in respect to the property in dispute [particulars withheld]. According to her, their late brother G M M fraudulently transferred the property to himself, subdivided it and sold it to 3rd parties. She accused her sister I and her late brother for being violent and grabbing the briefcase that contained important documents belonging to their late father. She further told this Court that she reported the incidents and fraudulent transfer of the said property in dispute to the Criminal Investigation Department and was still waiting for action to be taken.

7. This Court on the basis of the evidence tendered concerning the status and the manner in which the said property (Mwea/Mutithi/Scheme/406) was transferred, summoned the Land Registrar Kirinyaga County to shed some light. **Julius Muthee Kiromo** (D.W.2) the Land Registrar came and told this Court that according to their records, the land in question was registered in the name of one Geoffrey Dan Ben Maina in 1973 and it was then indicated that the registered holder was a minor and hence a restriction was placed on the register. He further added that an application was later placed by the said G D B M on 30th July, 2014 to correct the name to G M M which was done on 30th July, 2014 and that on 8th August, 2014, the registered holder applied to sub divide the parcel into 2 parcels namely No. 2914 which he transferred to one JOSEPH MWANGI MWANIKI and Plot No. 2915 which he transferred to JOHN MWANIKI MACHARIA. He conceded that the transfers were done on 19th January, 2015 after the demise of the said G M M on 5th January, 2015.

8. I have considered both the protestor's case and her submissions and I have also considered the submissions made by the petitioners/administratrixes. In my considered view the parties in this cause are all in agreement with what constitutes the assets and who the dependants are save for the following issues which now requires determination:-

- (a) Whether L.R. No. [particulars withheld] forms part of the estate in this cause.
- (b) Whether M N the grandson to the deceased in this cause should be considered a dependant and entitled to a share of the estate in this cause.
- (c) Which between the two proposed modes of distribution by the administratrixes and protestor is lawful, just and fair?

(a) Whether that property known as Mwea/Mutithi/Scheme/ 406 forms part of the estate.

9. It is not contested that that property known as [particulars withheld] ceased to exist upon sub division into 2 parcels [particulars withheld] and [particulars withheld]. It is also not in dispute that prior to the sub division the property was not registered in the name of the deceased herein but G M M. The District Land Registrar told this Court about the history of the parcel and how it changed hands and from the evidence tendered it does appear that the said property changed hands in unclear circumstances. The irregularity seemed compounded by the date of transfer from G M M to the current registered holders because the transfer happened after the demise of the said G M M. The petitioners concerns in this cause appear to be legitimate and valid. However, this Court, as a succession court, draws its jurisdiction from the **Law of Succession Act Cap. 160** which provides under the provisions of **Section 2 (1)** that the Act only applies to all cases of intestate or testamentary succession to the estates of deceased persons and to the administration of estates of those persons. **Section 3** of the Act defines the estate as the free property of a deceased person and the free property is defined as the property which that person was "legally

competent to freely dispose during his lifetime”

10. It is true that **Section 47** of the Act as cited by the Petitioners gives this Court wide powers to determine any dispute under the Law of Succession Act and make any orders or decrees as may be expedient or just. These powers however, are limited in scope because they can only be applied in accordance with **Section 2(1)** of the Act. Disputes over ownership of land particularly when it is between a deceased person or his estate and a 3rd party are better handled in special courts that have been created and mandated by the Constitution to deal with them. **Article 162 (2)** of the **Constitution** establishes and gives jurisdiction to Environment and Land Court that was created through an act of Parliament (Environment and Land Court Act) **Chapter 12A** Laws of Kenya. This Court finds that under **Section 13** of that Act, the Environment and Land Court has jurisdiction to determine the issue raised by the Petitioners in this cause. They have the liberty as administratrixes of the estate of the late B M D (the deceased herein) to challenge the process that may have seen the disputed parcel (read particulars withheld) irregularly change hands. Once and if the Environment and Land Court makes a favourable finding in their cause and reverts the property to deceased then they can now move this Court for administration and/or distribution of the estate in accordance with the Law of Succession Act Cap. 160 Laws of Kenya. In that court the Petitioner can cite the cited provisions of the civil Procedure Act and rules because they would then apply. Otherwise for now this Court finds that because the property known as **[particulars withheld]** is not registered in the name of the deceased herein and has changed both its character and ownership it cannot at this stage form part of the estate of the late B M D.

11. (b) Whether M N is a dependant of the deceased.

It is not in dispute that M N is a grandson to the deceased. What is contested is whether he should be considered as a direct beneficiary in distribution of the estate herein. A child to a deceased person under **Section 29** is automatically a dependant and therefore entitled to a share of the estate. A grandson to a deceased person has to have been maintained by the deceased prior to his demise to qualify to be a dependant within the meaning assigned by **Section 29** of the Act. **Section 29 (b)** provides as follows in relation to who a dependant is;

“Such of a 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.....”

The evidence tendered before this Court showed that M N was named after his grandfather – B M D. It is therefore apparent that the grandson occupied a special status with his late grandfather’s life. Apart from this is that the grandfather paid his fees prior to his demise a fact that is conceded by the protestor in this cause. This Court therefore finds that the said M N fits into the description of a dependant and should be considered so in this cause. The protestor claimed that another grandson named C M (an alleged son to G M M) should also be considered but no evidence was tendered before me to demonstrate that the said C M was a dependant leave alone his whereabouts. I therefore find that he cannot be considered a dependant in law and cannot benefit from the distribution of the estate herein.

12. (c) Distribution of the Estate of the late B M D.

The distribution of an estate of deceased person is provided clearly by law. **Section 38** of **Law of Succession Act Cap. 160** provides as follows:-

“Where an intestate has left a surviving child or children, the net estate shall.....be equally divided among the surviving children.

The assets comprising the estate in this cause are as follows:

(i) **[particulars withheld]**.

(ii) [particulars withheld].

(iii) [particulars withheld]

(iv) Trailer, plough, jembe and water tank.

(v) Money at **Account No. [particulars withheld]** at Equity Bank – Kagio Branch.

The surviving children left behind by the deceased are as follows:

(i) I N M.

(ii) L W M

(iii) M M M.

(iv) M N M; and

(v) Grandson M N.

The distribution of the estate of the late B M D shall therefore be as follows:

13. (i) [particulars withheld] shall be shared equally among:

1. I N M.

2. L W M

3. M N M; and

4. M M M

(ii) **L.R. [particulars withheld]** shall be distributed equally among the following children of the deceased:

1. I N M

2. L W M

3. M N M; and

4. M M M

(iii) **L.R. [particulars withheld]** shall be distributed equally among the following children:

1. I N M

2. L W M

3. M N M and

4. M M M

(v) Money at Equity Bank **Account Number [particulars withheld]** – this money shall go towards school fees for M N.

(vi) Trailer, plough, jembe and water tank. The same shall go to M N.

The surveyor's fees needed to subdivide the above parcels of land shall be met equally by the four named beneficiaries and each party shall bear own costs in this cause because this is a family matter.

Dated and delivered at Kerugoya this 12th day of October, 2016.

R. K. LIMO

JUDGE

12.10.2016

Before Hon. Justice R. K. Limo J.,

Court Assistant Naomi Murage

Simon Kinyua present

Peter Karani present

COURT: Judgment dated, signed and delivered in the open court in the presence of both the petitioner in person and the protestor.

R. K. LIMO

JUDGE

12.10.2016