



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HIGH COURT SUCCESSION CAUSE NO 28 OF 2015
IN THE MATTER OF THE ESTATE OF THE LATE
MURIANKI M'MARETE - (DECEASED)

-AND -

JANE ITHIMAPROTESTOR

- VERSUS -

KARIA MURIANKI.....PETITIONER

JUDGMENT

1. According to the Affidavit sworn by Karia Murianki M'Marete on 20th June, 2012, the late Murianki M'Marete (hereinafter "the deceased") died in or about 1968. On a date and month that is not clear from the record, but sometimes in 2012, the said Karia Murianki M'Marete (hereinafter "the Petitioner") petitioned for Letters of Administration Intestate for the estate of the deceased as a widow in Chuka PMC Succession Cause No.315 of 2012. She neither obtained a letter of introduction from the local chief nor did she disclose in form No. P & A 5 who the survivors of the deceased were. She did however, disclose the property known as Muthambi/Igamurathi/380 ("Plot No.380") as the only asset of the estate of the deceased. Pursuant thereto, a grant was issued to her on 19th November, 2012.

2. Prior thereto, the Petitioner had also filed Chuka CMC Succession Cause NO.207 OF 2012 in respect of the same estate but only disclosed the property known as LR NO.Muthambi/Igamurathi/144 ("Plot No.144") as the only asset constituting the estate. On 22nd March, 2016, the Petitioner applied for confirmation whereby she proposed that the estate of the deceased now comprising both Plot Nos.380 and 144 be distributed as follows:-

(a) LR. Muthambi/igamurathi/380

Karia Murianki Marete - wholly

(b) LR. Muthambi/Igamurathi/144

(i) Dominic Kaburu Mwaniki – 1.0 Acres

(ii) Jane Ithima – 0.10 Acres

(iii) Kithinji Michael Njagi – 0.30 Acres

(iv) Karia Murinki M'Marete

To hold the balance in trust for Felista Mukwaiti Marangu, Penina Mukwanjeru and Getrude Igoki.

On 10th March, 2016, the firms of L. Kimathi Kiara & Co. Advocates for the Petitioner and Basilio Gitonga, Murithi Advocates for the Protestor recorded a consent whereby both Succession Cause Nos.207 and 315 of 2012 were consolidated as Chuka High Court Succession Cause No.28 of 2015.

3. Directions were given that the matter be determined through Affidavits on which the respective Advocates were to make submissions. The Petitioner opted to rely on her Affidavit in support of the application for confirmation sworn on 21st March, 2016. In it, she contended that the deceased was survived by:-

- a) Dominic Kaburu Murianki
- b) Jane Ithima
- c) Penina Mukwanjeru
- d) Getrude Igoki
- e) Felista Mukwaiti
- f) Michael Kithinji Ngagi

That the estate constituted the two properties already referred to above and she gave her aforesaid proposed distribution. However, while the matter was pending judgment, she filed another Affidavit on 29th November, 2016 whereby although she retained the two properties as the assets constituting the estate, she omitted the name of Michael Kithinji Ngagi as a beneficiary.

4. On her part, Jane Ithima Murianki, "the Protestor" relied on her Affidavit of Protest filed on 9th June, 2016 and two on the Affidavits of Eustace Mundi M'Thambu and Jackson Mburunga Njagi. In her protest, she contended that the deceased was survived by the following:-

- a) Karia Murianki Marete – Widow
- b) Felista Mukwaiti Maranga – Daughter
- c) Jane Ithima Murianki – Daughter
- d) Penina Mukwanjeru Gitari – Daughter
- e) Dominic Kaburu – Son
- f) Catherine Igoki Gitari – Daughter
- g) Mary Goreti – Deceased.

5. She further contended that the deceased had expressed the wish that Plot No.144 be shared out equitably between the Petitioner, Dominic Kaburu and the Protestor because it is the three (3) who were in actual occupation. That she is unmarried and has been utilizing a distinct portion of plot No.144 with the Petitioner and Dominic Kaburu having their own portions thereon. That the Petitioner has sold portions of plot No.144 to David Muchangi Njeru and Kithinji Michael Njagi and has therefore variously attempted to evict the protestor from her portion on plot No. 144. That the Petitioner had benefited from the deceased on Muthambi/Gatua/122. She therefore proposed that the estate be distributed as follows:-

a) LR. Muthambi/Igamurathi/144

- i) Karia Murianki – 0.47 ares
- ii) Dominic Kaburu Murianki – 1 acre
- iii) Jane Ithima Murianki – 1 acre

b) LR. Muthambi/Igamurathi/380

- i) Felista Mukwaiti Marangu
- ii) Penina Mukwanjeru To hold jointly
- iii) Catherine Igoki

She produced minutes of a meeting held on 27th July, 2008 at Muthambi Chief's Office by the full Ithima clan to which the parties belong. Those minutes showed that the meeting had resolved that the parties continue to live peacefully on plot 144 pending succession.

6. Eustace Mundi M'Thambu deponed that before the deceased died, he had expressly stated that plot No.144 be shared equally between Dominic Kaburu and the Protestor but had made no wishes regarding plot No.380. That the deceased had transferred Muthambi/Igamurathi/122 to the Petitioner while he was alive. That the Protestor was given part of plot 144 because she was the only unmarried daughter of the deceased. That Michael Kithinji Njagi appearing in the Petitioner's proposed distribution is a total stranger to the estate of the deceased. That the deponent was conversant with the affairs of the family of the deceased as the latter was his uncle. Jackson Mburugu Njagi on his part deponed that he is a clan member and conversant with the matters touching on the estate of the deceased. He repeated the same facts stated by Eustace Mundi M'Thambu.

7. Mr Murithi for the Protestor submitted that the lower court lacked pecuniary jurisdiction to entertain the cause; that under section 76 of the Act, the Petitioner had failed to disclose the interest of the Protestor nor seek her consent; that she had acted fraudulently by including a stranger, David Muchangi Njeru, in the distribution and by instituting two (2) separate Succession Causes for the same estate. Counsel urged that the protest be allowed. For the Petitioner, Mr Kimathi submitted that the proposal by the Applicant was discriminatory as it did not consider the other daughters of the deceased. Counsel urged that the court do adopt the distribution proposed by the Petitioner.

8. The issues for determination are:-

- a) Who are the beneficiaries of the estate of the deceased?
- b) Had the deceased expressed his wishes on how his estate would be inherited?
- c) How should the estate be distributed?

9. As stated at the beginning of this judgment, the Petitioner did not procure the letter of introduction from the local chief which would ordinarily have set out who survived the deceased. Be that as it may, both the Petitioner and the Protestor gave names of persons who allegedly survived the deceased. The two lists agree on the following:-

- a) Karia Murinki Marete
- b) Jane Ithima
- c) Penina Mukwanjeru

d) Dominic Kaburu Murianki

e) Felista Mukwaiti

There is a sixth (6) person whom the Petitioner refers to as Getrude Igoki but the Protestor referred to as Catherine Igoki Gitari. The court will take her to be one and the same person. All the foregoing were agreed by both parties to be the beneficiaries of the estate. Indeed, the Protestor was frank in her Affidavit as she disclosed their direct relationship with the deceased as being widow, daughters and son of the deceased. Under section 38 of the Law of Succession Act, these are entitled as beneficiaries of the deceased.

10. The Petitioner named one Michael Kithinji Njagi and proposed that 0.30 acres be distributed to him from plot No.144. She did not disclose what relationship existed between the said Michael Kithinji Njagi with the deceased. The Protestor and her witnesses swore that the said Michael Kithinji was a stranger to the estate. That he had purported to purchase a portion of plot No.144. These averments made on oath were never denied by either the Petitioner or the said Michael Kithinji Njagi. To the extent that there was no evidence to show that the said Michael Kithinji was either a beneficiary or a dependant of the deceased, this court makes a finding that he is not a beneficiary and not entitled to participate in the distribution of the estate.

11. Accordingly, on the evidence on record, the following are the beneficiaries of the estate of the deceased:

a) Karia Murianki Marete

b) Jane Ithima

c) Penina Mukwanjeru

d) Dominic Kaburu Murianki

e) Felista Mukwaiti

f) Catherine Igoki/Getrude Gitari

12. The next issue is whether the deceased had expressed his wishes on how his estate was to be inherited. The Protestor deponed that the deceased's wish was that plot No.144 be shared out equitably between her, the Petitioner and Dominic Kaburu because they were the three (3) who were in actual occupation thereof. That no wishes were expressed by the deceased regarding plot No. 380. This testimony was supported by Eustace Mundi M'Thambu and Jackson Mburugu Njagi, respectively. Indeed, according to the minutes produced as "J I M II" of a meeting held on 27th July, 2008 by the Ithima Clan to which the parties belong, it was found that the people in occupation of plot No. 144 were the Petitioner, the Protestor and Dominic Kaburu. That meeting that was held in the offices of the Chief Muthambi location was attended by the clan members, the Protestor, the Petitioner, Dominic Kaburu, the Chief, the Assistant Chief of the area as well as the village elder for Igamurathi. These minutes and the resolutions therein were neither denied by the Petitioner nor challenged.

13. In this regard, this court's view is that it is clear that the deceased had partially settled his family. He transferred one of his properties to the Petitioner being LR NO. Muthambi/Gatua/122. He left the Petitioner, the Protestor and Dominic Kaburu in occupation of Plot No.144. He indeed allowed them to construct their houses thereon. However, he seems to have made no mention of plot NO. 380 as well as his married daughters. It was clear from the evidence on record that he allowed the Protestor to construct a house and live on plot NO. 144 because she was unmarried.

14. On the basis of the foregoing, this court makes a finding that the deceased partially expressed himself how he should be inherited. He transferred plot No. 122 to the widow (Petitioner), that plot No.144

should be held by the Petitioner, the Protestor and Dominic Kaburu whom he left in occupation. As regards plot No. 380, the deceased made no wishes thereon.

15. The final issue is how the estate should be distributed. Since the widow is still alive, under section 35 of the Act, she is entitled to the life interest in the whole residue of the net intestate. Indeed the Court of Appeal held in the case of **JUSTUS THIORA KIUNGU & 4 OTHERS .V. JOYCE NKATHA KIUNGU & ANOR [2015]eKLR** that where the children of the deceased and his widow do not agree or consent on distribution, the estate is to remain undistributed for the widow to enjoy a life interest thereon in trust for the children equally.

16. In the present case, the parties have not consented on distribution. The widow has her own proposal on how to distribute the estate while the Protestor has given her own proposal. Under section 35 of the Act, the Petitioner would be entitled to a life interest on the whole residue of the net intestate. However, there are several circumstances in this case that militate against that. The widow is said to have already sold portions of plot No.144 to Kithinji Michael Njagi and David Muchangi Njeru. As a result of the said “sales”, which are completely unlawful and void, she with the connivance and active participation of Dominic Kaburu have been trying to evict the Protestor from her portion on plot No.144. Indeed it was alleged that they have been perpetrating violence upon her. They have uprooted the boundaries that had demarcated the portions which the parties have hitherto been cultivating. There has been uprooting and destruction of the food planted by the Protestor. All these have been in an attempt to make the Protestors life on the property of her father unbearable. Indeed, the clan meeting of 27th July, 2008 resolved that those close to the family of the deceased do expedite this succession so that each person gets a title for his/her own portion so as to avoid further squabbles and ensure peaceful co-existence of the survivors of the deceased. There was an allegation by the Protestor of a vicious attack by Dominic Kaburu on her son with a machete thereby inflicting him serious injuries. All these averments were neither denied nor challenged.

17. While it is easily and lawful to pronounce distribution as per section 35 of the Act, that the Petitioner enjoys a life interest on the whole residue of the net intestate in trust for the children of the deceased, one aspect pricks the conscience of this court. The law is meant to uphold and maintain social order. Because of the sinister motive by the widow and her son, Dominic Kaburu on the estate of the deceased to which all the beneficiaries have equal rights, save as per the wishes of the deceased expressed on plot No. 144, the court of law should moderate any harshness that exists and safeguard the life and comfort of all the beneficiaries. Ordering that the Petitioner continue to enjoy the life interest over the entire estate until her death in trust for the children of the deceased will only lead to continued squabbles, disputes and attempted eviction of the Protestor. To direct the Protestor to seek injunctive orders against the Petitioner and the brother will be postponing a problem. Firstly, there is no definite boundaries on the ground on which to restrict the two as they are entitled to enjoy the whole estate, secondly, Makau J found in his ruling of 5th May, 2015 that until the respective rights of the beneficiaries are ascertained and determined at confirmation, an injunction cannot issue in a P & A matter. While this court may confirm the grant and hold that each beneficiary is entitled to use and occupy the area he/she was utilizing at the time the deceased passed on, that status quo is very fluid to maintain where there is outright animosity between the beneficiaries like in this matter. A decisive and definitive decision is called for.

18. In the case of **Tau Kakungi .v. Margrethe Thorning Katungi & Anor [2014] eKLR**, Musyoka J held that the purpose of section 35 of the Act was to prevent a spouse of the deceased from being impoverished after the demise of the other by distributing the entire estate to the children. The court stated:-

“The effect of section 35 (1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children’s right to the property crystallizes upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate.

.....

The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance.” (Emphasis supplied).

This court fully subscribes to that reasoning.

19. In the present case, the deceased expressed the wish that plot NO.144 do benefit the Petitioner, the Protester and Dominic Kaburu. He left them in occupation thereof. To cushion the widow, from destitution, he provided for her by transferring to her Muthambi/Gatua/122. The widow has proved to be dishonest and incapable of administering the estate properly by filing two (2) separate succession causes for the same estate disclosing different assets for the estate with different modes of distribution. She has ganged up with one beneficiary and made life hell on earth for a daughter of the deceased who is a beneficiary of the estate. She has secretly sold or purported to sell portions of the estate to David Muchangi Njeru and Michael Kithinji Njagi. She is prepared to have strangers enjoy the property of the deceased at the expense of the deceased's own daughter! She herself has proposed that the estate be distributed. She had in Chuka PMC Succ Cause No.207 of 2012 distributed 0.25 acres on plot No.380 to amongst others David Muchangi Njeru a stranger. She now proposes 0.30 acres to Michael Kithinji Njagi. To my mind, for justice to be done, the estate of the deceased which he had expressed himself (Plot NO.144) should be fully distributed while the Petitioner can enjoy a life interest on the rest.

20. Because of what I have said about the Petitioner on her administration of the estate, the grants hitherto issued to her are hereby revoked. A fresh grant is issued to KARIA MURIANKI MARETE and JANE ITHIMU MURIANKI to be joint administrators of the estate of the late Marete M'Murianki.

21. In this regard, the estate will be distributed as follows:-

(a) LR Muthambi/IGAMURATHI/144

- (i) Karia Muranki Marete – 0.47 Acres
- (ii) Dominic Kaburu Murianki – 1 Acres
- (iii) Jane Ithima Murianki – 1 Acre

(b) LR Muthambi/Igamurathi/380

Karia Murianki Marete – life interest and in trust for:-

- (i) Felister Mukwaiti Marangu
- (ii) Penina Mukwanjeru
- (iii) Catherine Igoki Gitari in equal shares.

22. This being a family dispute, I will order no costs.

Dated and Delivered at **Chuka this 20th day of December, 2016.**

A.MABEYA,

JUDGE.