



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO.617 OF 2015

IN THE MATTER OF THE ESTATE OF MTWATHAMBU KANAKE (DECEASED)

AND

JOHNSON GITARI THAMBU.....PETITIONER

J U D G M E N T

1. Mtwathambu Kanake (*"the deceased"*) died on 6th February, 2002. He was survived by Johnson Gitari Thambu, Kellis Kaari Miriti, Lydia Kageni Ileri, James Mbae Thambu, Dorcas Karimi and Charles Riungu Thambu who were the beneficiaries to his estate. His estate consisted only of LR No. Muthambi/Gatua/509 measuring 4.72 acres (hereinafter *"the property"*).
2. On 1st October, 2015, Johnson Gitari Thambu (*"the Petitioner"*) petitioned for Letters of Administration Intestate which were issued to him on 21st January, 2016. On 20th July, 2016, he applied for the confirmation of thereof proposing to distribute the estate as follows:-

LR. NO. MUTHAMBI/GATUA/509

- | | | |
|---|---|------------|
| a. Johnson Gitari Thambu | - | 0.26 Acres |
| b. Johnson Gitari Thambu | - | 0.80 Acres |
| c. John Riungu Thambu | - | 1.54 Acres |
| d. James Mbae Thambu | - | 0.75 Acres |
| e. James Mbae Thambu | - | 0.29 Acres |
| f. Johnson Gitari Thambu and James Mbae Thambu (to hold in trust for themselves, Kellis Kaari Miriti, Lydia Kageni Ileri and Dorcas Karimi Njagi in accordance to their deceased father's will) | - | 0.20 Acres |
| g. Alexander Gitonga Barine (Buyer) | - | 0.93 Acres |
| h. Patrick Mutwiri Ileri (Buyer) | - | 0.05 Acres |

3. On 19th October, 2016 Kellis Kaari Miriti filed an Affidavit of Protest. She stated that she was protesting the mode of distribution on her own behalf and on behalf of her other two (2) sisters, Lydia Kageni Ileri and Dorcas Karimi Njagi. According to them, they were completely agreeable with the mode of distribution save that they were opposed to their share of 0.20 Acres being held by their two (2)

brothers, Johnson Gitari Thambu and James Mbae Thambu. They insisted that the same be held by themselves independently.

4. When the matter came up on 1st November, 2016 to give a date for hearing, Mr. Muriithi Learned Counsel for the Petitioner informed the court that the matter be determined on the basis of the affidavits on record. The Applicant supported that view and insisted that she and her sisters were only insisting on the 0.20 acres to be in their own names. I have carefully considered the Affidavits and this is the determination.

5. Looking at paragraph 4 (f) of the Affidavit in support of confirmation by Johnson Gitari Thambu, he indicated that he and his brother James Mbae Thambu do hold the share of their sisters of 0.20 Acres *"in accordance with their fathers will"*. That will was neither produced, nor any evidence produced to establish its existence. The Petition had been filed for intestacy. Neither was it proved that an oral will was made by the deceased, if so, when and in whose presence. The evidence of the existence of an oral will lacking, I hold that there was no will in terms of sections 8,9 and 10 of the Law of Succession Act (*"the Act"*).

6. Having found that there was no will what is the position of the law regarding intestacy? Section 38 of the Act provides:-

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

The law therefore stipulates that the estate is to be divided equally among the surviving children. The law does not discriminate between the children. It is both the daughters and sons, married or unmarried (see the Court of Appeal decisions in **Rono .v. Rono & Anor [2008] 1 KLR (G&F) 803 and Stephen Gitonga M'Murithi .v. Faith Ngira Murithi [2015] eKLR**).

7. It was never suggested that the daughters were minors or that they were incapable of managing their share under the Mental Health Act, Cap 254. To my mind, the Petitioner and his brothers were lucky that their sisters were agreeable to take 0.20 acres from the estate and did not insist on their full rights under the law. Otherwise the distribution would have been equal. They are not children whose share has to be held in trust.

8. In this regard, I find the protest to be meritorious and I allow the same. The estate will be distributed as follows:-

LR NO. MUTHAMBI/GATUA/509

- | | | |
|--------------------------|---|---------------------|
| a. Johnson Gitari Thambu | - | 0.26 Acres |
| b. Johnson Gitari Thambu | - | 0.80 Acres |
| c. Charles Riungu Thambu | - | 1.54 Acres |
| d. James Mbae Thambu | - | 0.75 Acres |
| e. James Mbae Thambu | - | 0.29 Acres |
| f. Kellis Kaari Miriti | | |
| Lydia Kageni Ileri | - | 0.20 acres- jointly |
| Dorcas Karimi Njagi | | |

g) Alexander Gitonga Barine - 0.90 Acres

h) Patrick Mutwiri Ileri - 0.05 Acres

It is so decreed.

DATED and Delivered at Chuka this 13th day of December, 2016.

A.MABEYA

JUDGE

Judgment read and delivered in open court in the presence of all the parties.

A.MABEYA

JUDGE

13/12/2016