



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 477 OF 2004

IN THE MATTER OF THE ESTATE M'ITOME M'THIRWA (DECEASED)

REBECCA NYOROKA M'ITOME.....PETITIONER

VERSUS

PETER MICHUBU BAITOME.....PROTESTOR

J U D G M E N T

1. The petitioner was issued with grant of letters of administration intestate dated 19th January, 2005 and by summons for confirmation of grant dated 21st July, 2005 sought confirmation of the grant as set out under paragraph 5 of the Supporting Affidavit on the mode of distribution.
2. That the protestor Peter MichubuBaitome being unhappy with the mode of distribution proposed by the petition filed his mode of distribution through an affidavit of distribution dated 17th June, 2007.
3. That during the trial conference court gave directions that the protest be determined by way of viva voce evidence. The protestor gave evidence in support of the protest and called no witness whereas the petitioner gave evidence and called one witness.
4. The protestor's case is that the mode of distribution proposed by the petitioner is unfair, unequal and unconsultative for reasons *interlia*; that their sisters are all married and have land elsewhere; that land parcel No.NjiaBuri-E-Ruri 349 is only 1½ acres while Njia/CiaMwendwa/1340 is 2.70 acres, that there is no other land for disposal; and that their mother should have life interest only.
5. The protestor's proposal on distribution that he considers fair is as follows:-
 - (a) Njia/Buri-E-Ruri/349 to be inherited by:
 - (i) Peter Michubu
 - (ii) John Mberia
 - (iii) Samuel Gitonga
 - (b) Njia/Cia Mwendwa/1340 to be inherited by:
 - (i) Peter Muchubu to hold in trust 20 points for Alice Kanana

- (ii) Rebecca Nyoroka to have life interest on 20 points
 - (iii) Ruth Nkatha – 10 points
 - (iv) Grace Nkirote – 10 points
 - (v) The balance to be shared equally between brothers
6. The protestor averred that the mode of distribution is fair because; Ruth Nkatha and Grace Nkirote are married and leave far away in Amwathe with their husbands and their intention is to sell their portions and not the inheritance. That A K is only 14 years old and will therefore secure her interest as Peter Muchubu educates her at Kithare Primary School in which by 2007 was in standard 7. That the petitioner came home after the death of their father herein and does not reside in the estate and as such her share should go to the protestor. The protestor relied solely on the contents of his affidavit dated 17th June, 2007.
7. During cross-examination the protestor admitted the petitioner is his mother, that there are 3 sons and 3 daughters of the deceased and that the deceased had two (2) parcels of land. That the sons live on Plot 349 and cultivate on the other land. The protestor averred that he wanted a bigger portion than his sisters because they are married and have their own lands and as he has many children. He proposed that plot No.349 be shared equally amongst the sons so that each gets 0.50 acres. On Plot 1340 comprising of 2.70 acres he proposes each son gets 0.70 acres so that each son ends up getting 1.20 acres.
8. The protestor argued that the married sisters have 16 acres where they are married and their mother lives by moving from one daughter's home to another arguing that the sisters cannot get land No.1340 as the deceased's sons have their own children who should get a share of the land as the land belongs to the father to the protestor and he has not bought his own land. During re-examination OW1 confirmed that no one is living on plot 1340 as all sons stay on plot No.349.
9. The petitioner case is that she is wife to the deceased herein and that the deceased assets composed of Njia/Buri-E-Ruri/349 and Njia/Cia Mwendwa/1340; that the petitioner and her late husband were blessed with 9 children, 3 of whom are deceased. The surviving children are:-
- 1. Samuel Gitonga
 - 2. Peter Michubu
 - 3. John Mberia
 - 4. Grace Nkirote (married)
 - 5. Ruth Nkatha (married)
 - 6. Alice Kanana (married)
10. The petitioner testified that she wishes the land to be shared as follows:
- (a) L.R.NjiaBuri-E-Ruri 349 consisting of 1 ½
 - To: Peter Michubu, John Mberia and Samuel Gitonga in Equal shares.
 - (b) L.R. Njia Cia Mwendwa/1340 comprising of 2.75 to be shared equally amongst the following:
 - (i) Alice Kanana
 - (ii) Rebecca Nyoroka
 - (iii) Ruth Nkatha
 - (iv) Grace Nkirote

11. The petitioner testified that plot 349 is smaller than plot no.1340 but is fertile than plot no.1340 and that is why she proposes that her sons get smaller portions. The value of plot No.349 she argued is higher as it has miraa and each son earns from the miraa about Kshs.100,000/= per month whereas plot no.1340 has nothing but is solely used for cultivation. The petitioner argued that she stays at plot no.1340 where she has a house after one of her sons Peter Michubu, the protestor beat her up and chased her away with a panga as he takes bhang. She added the sons used the proceeds from the miraa to purchase their own shambas.
12. During the cross-examination of PW1 she testified that plot no.349 should go to her sons who should not get anything from plot no.1340. She reiterated plot no.349 has a higher value than 1340 and that her sons have bought other lands. That her daughters are married and stay at their matrimonial homes. She denies the protestor's proposal for her to have life interest on plot no.1340 as she has been bothered by her sons.
13. PW2 Ruth Nkatha a daughter of the deceased herein in her evidence was in agreement with evidence of PW1, Rebecca Nyoroka as regards the deceased assets and heirs. She testified that when the deceased herein passed on, he was residing at plot no.349 with the petitioner but all his daughters were by then married. That after the death of the deceased herein the protestor, Peter Michubu chased the petitioner herein away. PW2 took PW1 to the hospital after she had been assaulted by the protestor. That the three daughters constructed a house for petitioner on plot no.1340 where the petitioner stays to date. Whereas the sons stay at plot no.349 where they live in common compound with no boundaries between themselves.
14. That on plot no.349 there are mature miraa trees. Plot no.1340 is on a dry area and is only used for growing maize and beans for domestic use. PW2 supported the Petitioner's mode of distribution and added that her sisters also supports the same. She testified that she is not in agreement with the protestor's mode of distribution. She added that though they are married, they need a portion out of plot No. 1340 as their late father had offered to give them a share of the same and further she stated that the Constitution recognized their claim insisting that the deceased's daughters have several children as their brother has. She further averred that in case any of the daughters disagreed with her husband, she would have a place to fall back to. She objected to the petitioner getting a life interest insisting she should have absolute right over her share of land arguing her brothers have no right to get more share of land than the daughters. She added the deceased sons gets income of Kshs.100,000/= per month from the selling of miraa on plot no.349 whereas on plot no.1340 when weather is good they can get 10 bags of maize and at least 3 bags of beans. She testified that plot 349 go to her brothers only.
15. PW2 on being cross-examined testified that if she is chased from her matrimonial home she will return to her father's land. On her brother's income she contended that though she has no documentary evidence on her brother's earnings from the miraa her late father used to earn the same; stating that her brothers earns as such amount as her father used to share his income with them. She testified that it is the petitioner who lives on land L.R. Njia Cia Mwendwa/1340.
16. That after close of the protestor's and petitioner's case both counsel put in their respective submissions. M/S Muia Mwanzia & Co. Advocates filed submissions for the protestor on 21st March, 2015 whereas M/S Haron Gitonga & Co. Advocates filed the submissions on behalf of the Petitioner on 20th April, 2015. I have carefully examined the pleadings by both protestor and the petitioner and have considered evidence and rival submissions by parties' respective counsel. The issue for consideration in this matter can briefly be summarized as follows:-
 - (a) Who amongst the deceased dependants are entitled to inheritance of his estate?
 - (b) Which of the two proposals one by the petitioner and the other by the protestor is fair, reasonable and equitable for and in accordance with the provisions of the law of Succession Act?
17. The deceased was survived by the petitioner and her 6 children namely:

- (1) Peter Mibubu
- (2) John Mberia
- (3) Samuel Gitongo
- (4) Ruth Nkatha
- (5) Grace Nkirote
- (6) Alice Kanana

18. Under Section 29(a) of The Law of Succession Act, (Cap.160) the definition of the “dependants” of the deceased is given as follows:

“29. For the purposes of this Part, “dependant” means-

(a) The wife of wives, or former wife of wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.”

19. The protestor's contention is that as all his sisters are married and have land elsewhere and that he has many children they should not be considered in distribution of the deceased estate or rather they should get no share. He further contends that his mother should have life interest only. The petitioner on the other hand with the deceased daughters termed the protestor's proposal as illegal and unconstitutional.

20. The protestor's objection as I understand it, is that the deceased daughter's should get less or nothing because the deceased daughters are married and are blessed with their own lands. There is no dispute at all that the deceased daughters are “dependants” and/or “beneficiaries” to the deceased estate and such I have no doubt that as such they are entitled to the deceased estate whether married to rich or poor husbands and their husbands being well up is no here or there. That if the protestor's contention is allowed to stand, I am of the view that it will be discriminatory against the daughters on the grounds of marital status and that would be unconstitutional as it would be against Article 27(3)(4) and (5) of the constitution of Kenya 2010 which provides:

“27. Equality and freedom from discrimination

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

(4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)”

21. In view of the above, I find and hold that the deceased widow, sons and daughters whether married or not are entitled to share or to inherit from the deceased estate and the issue of their husband's property cannot be used as a basis to deny the deceased daughters a share of their deceased parent's estate

22. The protestor and the petitioner in their Supporting Affidavit and their evidence and that of the petitioner's witnesses in agreement on the deceased assets. There is no dispute on how L.R. Njia/Buri-E-Ruri/349 should be distributed. All parties are in agreement that the same should be shared by the deceased three sons. The protestor as regards L.R. Njia/Cia Mwendwa/1340

proposes Alice Kanana to get 0.20 acres; Rebecca Nyoroka life interest for 0.20 acres; Ruth Nkatho 0.10 acre and balance of 2.10 acres to be shared equally between the sons so that each gets 0.70 acres.

23. The petitioner and the deceased daughters proposed that L.R. Njia Cia Mwendwa/1340 should be shared equally amongst the petitioner and her 3 daughters in execution of all the sons. There is evidence that the sons became hostile to the petitioners, protestor beat the petitioner and chased her from plot No.349; that the deceased daughters constructed a house for petitioner on plot 1340 which is occupied by the petitioner and all deceased children cultivate on the said land. There is also evidence that plot no.1340 though bigger than 349, is less fertile and is less developed and its value is lower compared to 349. That the land is in an arid area which can only be used for growing subsistence crops.
24. I have carefully considered the evidence adduced before me and noted there is hostility between the protestor on one side and the petitioner and her daughters on the other and such the two groups cannot co-exist peacefully on parcel No.Njia/Buri-E-Ruri/349 which is solely occupied by the deceased three (3) sons. That plot No.Njia/Cia Mwendwa/1340 is occupied by petitioner on which she has her home though her children including the daughters cultivate on the said land. The petitioner and her witnesses contention that plot 1340 is of less value was not contested by way of evidence by the protestor. He did not deny that the production on plot No.349 is high as it is more developed with miraa whereas plot 1340 is used for cultivation of seasonal crops. That plot 1340 though slightly bigger than plot 349, that extra size can be catered for by the difference in their respective values and developments previously carried out by the deceased during his life time and I am satisfied from the evidence that plot No.349 is more developed with mature miraa trees which are income generating crops and its value is higher than plot no.1340 which is less developed and is in a semi-arid area.
25. Further on issue of distribution, I have to point out that the fact that the protestor's sisters are married and as alluded to by the Petitioner that they are not entitled to deceased's estate that contention is contrary to the Constitution of Kenya under Article 27 which prohibits discrimination on the basis of sex, pregnancy, marital status amongst others (see Article 27 of the constitution). Further Article 60 of the constitution of Kenya do not support the protestor's contention as married daughters are entitled to equitable access to land and gender discrimination related to land and property in land is outlawed.
26. Recently the Court of Appeal addressed itself on a similar matter in *Court of Appeal NO.30 of 2014 (Nyeri) on the matter of the estate of M'Ikungu M'Wiricha (deceased) between Justus Thiora Kiugu & 4 others and Joyce Nkatha Kiugu and another* where the Court stated;

***“The learned Judge of the High Court did not need to attempt a distribution of the estate of the late M'Ikiugu M'Wirichia when his widow, Joyce Nkatha Kiugu was alive. The Judge did not need to entertain protracted objection proceedings that raged on for over a decade. We cannot in any way blame the Judge, as he was allowing the parties to express themselves; the parties were driving the proceedings in their own way by providing the court their own preferred modes of distribution of the deceased's estate.*”**

We think we have said enough to demonstrate that there is no other legal way of distributing the deceased's estate other than the Law of Succession Act Cap 160”.

The upshot is that I reject the protestor's proposed mode of distribution as it was unfair, unconstitutional and contrary to section 35 of the Law of Succession Act. The Protestor and his brothers have used force to deprive the Petitioner and her daughters use and enjoyment of the most productive parcel of land which they want to keep to themselves while their mother, the widow of the deceased continues to suffer. This in my view is unfair, unjustifiable and should not be allowed by any Court of law on an estate of a deceased person who is survived by a widow. The Law of Succession Act provides how the estate should be distributed. Section 35(1) (a) and (b) of the Law of Succession Act provides;

“Subject to the provisions of Section 40, where the intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to;

a) the personal and household effects of the deceased absolutely

and

(b) a life interest in the whole residue of the intestate estate

.....

.....

Subjecting to the provisions of Section 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow’s re-marriage; of the surviving spouse devolve upon the surviving child, if there be only one, or be equally divided among the surviving children”.

27. In view of the above and considering the provisions of Section 35 of the Law of Succession Act I find the proper mode of distribution of the deceased’s estate is as provided by the provisions of the Law of Succession Act. All deceased assets stated herein below and other residue should be registered in favour of widow Rebecca NyorokaM’Itome to hold in trust for herself and the deceased’s children in equal shares being the following properties;

- (a) 1. L.R. Njia/Buri-E-Ruri/349
- 2. L.R. Njia/Cia Mwendwa/1340
- (b) Petitioner gets costs of this cause.

DATED AND DELIVERED AT MERU THIS 21ST DAY OF MAY, 2015

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

- 1. Mr. Mwanzia for protestor
- 2. Mr. Haron Gitonga for petitioner
- 3. C/clerk – Peninah/Mwenda

J.A. MAKAU

JUDGE