



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 414 OF 2013

IN THE MATTER OF THE ESTATE OF KABEU KABUNGI alias KABEU KABUNGI
GACINI (DECEASED)

POLINE WAKARIA KABEU.....PETITIONER

AND

IRENE WAMUTIRA MUNGE.....PROTESTOR

JUDGMENT

1. The cause above relates to the estate of **KABEU KABUNGI ALIAS KABEU KABUNGI GACINI** (deceased) who died intestate on 13th May, 2012 domiciled at Kirunda. The petition filed lists the following dependants to the estate left behind by the deceased.
 - i. Poline Wakaria Kabeu (widow) who is the petitioner/administratrix herein.
 - ii. Dickson Muthie Kabeu (son)
 - iii. Stanley Murage Kabeu (son)
 - iv. Robert Njanja Kabeu (son)
 - v. Francis Kithaka Kabeu (son)
 - vi. Geoffrey Kinyua Kabeu (son)
 - vii. Catherine Wanjiku (daughter in law)
 - viii. Julia Wangui (daughter in law)
 - ix. Rose Wambui (daughter in law)
 - x. Faith Wainoi (daughter in law)
 - xi. Josephine Mumbi Kabuthi (sister in law)
 - xii. Irene Wamutira Murage (daughter in law)
 - xiii. Elizabeth Wanjiru Gachoki (daughter in law)
 - xiv. Francis Mugo Muriithi (step son)
2. The only property forming the estate in this cause is that property known as **L.R. NO. MUTIRA/KIRUNDA/380** that measures around 11.4 acres as per certificate of official search filed together with the petition.
3. **Poline Wakaria Kabeu** was appointed the administratrix in this cause by this Court on 15th November, 2012 and vide summons dated 19th February, 2014 she sought for confirmation of the grant issued to her proposing to distribute the estate as follows:
 - a. Susan Muthoni Muthii 0.3 ha
 - b. Stanley Murage Kabeu 0.3 ha

c. Robert Njanja Kabeu	0.3 ha
d. Stephen Karimi Kabeu	0.3 ha
e. Francis Mugo Muriithi	0.2 ha
f. Geoffrey Kinyua Kabeu	0.3 ha
g. James Nganga Mugo	
h. Poline Wangeci Mugo	To share 0.3 ha equally
i. Mary Muthoni Mugo	
j. Joseph Mumbi Kabuthi	0.4 ha
k. Irene Wamutira Munge	0.4 ha
l. Elizabeth Wanjiru Gachoki	0.4 ha
m. Francis Kithaka Kabeu	0.3 ha

4. **Irene Wamutira**, sister in law to the deceased protested against the above mode and filed a protest which this Court directed that the same be disposed of by way of oral evidence.
5. In her evidence, the protestor though initially stated that the deceased herein was her father in law later changed and said that the deceased was in fact a brother in law as he was the brother of her late husband Munge Kabungi. She proposed that Poline Wakaria Kabeu be given 5.4 acres while herself together with Josephine Mumbi, Elizabeth Wanjiru and Irene Wamutira be granted 2 acres each out of the estate. Asked to explain why, she stated that Poline Wakaria was the elder one among them and so she deserved more.
6. Under cross-examination from the administratrix of the estate, the protestor insisted that the land forming the estate belonged to their father in law Wanjiku Wa Kabeu. She however, told this Court that she had no document to prove her claims but insisted that all she wanted was 2 acres out of the estate.
7. Josephine Mumbi and Elizabeth Wanjiru both told this Court that they had no issues with the proposed mode of distribution by the Petitioner herein.
8. The Petitioner on her part supported her proposed mode of distribution saying that the land forming the estate belonged to her late husband Kabeu Kabungi exclusively. She argued that her late husband had decided on his own volition to give her late brothers Murage Kabungi, Munge Kabungi and Kabuthi Kabungi one acre each as a gift *inter vivos* during his lifetime. She further stated that her late husband had given 0.2 ha to Francis Mugo as a gift during his lifetime and did not wish to interfere with the same.
9. The petitioner has told this Court that she recognizes the protestor (Irene Wamutira) and the other sister in laws Josephine Mumbi Kabuthi and Elizabeth Wanjiru Gachoki, as they were all married to her brothers in law who are now deceased, and that they are entitled to the one acre each given by the deceased to their respective husbands Kabuthi Kabungi (deceased) Stanley Murage Kabungi (deceased) and Eliud Munge Kabungi. The three deceased persons were brothers to the deceased herein. In addition to this she told this Court that the said sisters in law including the protestor and their children have been staying in their respective one acre within the estate for more than 20 years.
10. This Court has considered the protest filed and the evidence adduced by all the parties who testified in Court. The parties herein recognize one another and the only issue for determination is the question of distribution of the estate of the late Kabeu Kabungi.
11. The protestor told this Court that the deceased in this cause held the property comprising the estate herein in trust of his brothers including her late husband Eliud Munge Kabunge. She however, could not produce any document to prove her claims. A trust is a question of fact that requires proof to be established. In the absence of proof, this Court is unable to find basis for her protest in this cause. It is always a rule of evidence that whoever alleges must be proved. The protest had the onus to prove that indeed a trust existed in the registration of the deceased KABEU KABUNGI as the registered owner of that property known as **L.R. NO. MUTIRA/KIRUNDA/380**. This Court has looked at the certificate of official search that was filed together with this petition and it clearly shows that the deceased was the absolute registered owner. There is no trust indicated on the register. The allegation of trust has not been proved by the evidence presented and the same cannot stand the test of law.
12. This Court has considered the proposed mode of distribution of the estate suggested by the Petitioner herein in addition to what she told this Court during the hearing. I am satisfied that the

proposed mode of distribution is fair and tenable in law. The protestor including Josephine Mumbi Kabuthi and Elizabeth Wanjiru Gachoki should count themselves lucky as the deceased gave their late husbands one acre each as a gift *intervivos* and allowed them to occupy and utilize their respective portions. They became dependants to the estate in that regard and the administratrix has recognized the fact and wants the gifts made by the deceased respected. The law under the provisions of **Section 42 of Law of Succession Act** (Cap. 160) Laws of Kenya) recognizes such gifts and must be respected once established.

13. This Court has also taken into account the evidence of Elizabeth Wanjiru Gachoki and Josephine Mumbi Kabuthi who told this Court that they had no issues with the proposed mode of distribution suggested by the administratrix herein. In the light of the aforesaid this Court finds that the protest filed herein has no basis. The grant issued on 15th November, 2012 issued to the Petitioner herein is hereby confirmed and the distribution shall proceed as per paragraph 4 of the affidavit in support by Petitioner sworn on 19th February, 2014 with the following clarifications:

- i. Each beneficiary will be given his/her share where they have been living or utilizing.
- ii. The Petitioner shall have 1 ½ acres of the estate for herself and in trust of her daughters namely Catherine Wanjiku, Rose Wambui and Faith Wainoi.
- iii. James Nganga Mugo, Poline Wangeci Mugo and Mary Muthoni Mugo will share equally 0.30 ha from the estate.

There shall be no order as to costs. It is so ordered.

Dated and delivered at Kerugoya this 27th day of October, 2015.

R. K. LIMO

JUDGE

27.10.2015

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Pauline Wakaria present

Irene Wamutira present

COURT: Judgment dated, signed and delivered in the open court in the presence of Poline Wakaria kaberu, the petitioner appearing in person and Irene Wamutira Munge also appearing in person.

R. K. LIMO

JUDGE