



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 103 OF 2011

IN THE MATTER OF THE ESTATE OF MUGA MUNYUA(DECEASED)

GEOFFREY KIRAI MUGA.....1ST RESPONDENT

KAARIA M'MUGAA.....2ND RESPONDENT

VERSUS

STANLEY KIMAITA& 3 OTHERS.....OBJECTOR

RULING

The petitioners to the estate of the deceased herein were issued with temporary grant of letters of administration intestate to the estate of Muga Munyua on 16th May, 2011.

On 16th July, 2012 the parties consented to file affidavits and submissions on the mode of distribution of the deceased estate. The consent was adopted by court as an order of the court.

The petitioner filed their affidavit on mode of distribution dated 13th September, 2013 and their submissions on mode of distribution dated 15th November, 2013 on the same day.

The 1st petitioner Stanley Kimaita and 2nd protestor M'Mbui M'Muga filed protestor's affidavit on mode of distribution dated 13th September, 2012. That before the protest could be heard the 2nd protestor M'Mbui M'Muga passed on and was substituted through an application dated 6th June, 2013 by Susan Munyange his wife and his protest was marked withdrawn.

The submissions on behalf of the 1st protestor were filed by the firm of M/S L. Kimathi Kiara &Co. Advocates on 21st February, 2014. The 1st objector filed objection to making of grant dated 27th February, 2012 and submissions on the mode of distribution of the estate dated 17th February, 2014 and filed on 19th February, 2014.

The brief facts of this cause is that the deceased was survived by the following:-

- 1. M'MbuiM'Muga son, now deceased and substituted with Susan Munyange, his wife,**
- 2. M'Mutura M'Muga, son,**

3. Kaaria M’Muga son,

4. Geoffrey Kirai, Son

5. Stanley Kimaita, son

6. Esther Ngiriki, Daughter

7. Joel Kimaita, grandson, a son of the deceased daughter of the deceased and has been living with the other deceased beneficiaries at the deceased homestead as per submission by Mr. A. Anampiu Counsel for the petitioners.

The 1st protestor Stanley Kimaita depones that he is a son from the 1st widow of the deceased. He avers that the deceased had shown his beneficiaries a portion of land and each one of the beneficiaries occupies their respective portions and the same one duly fenced. He avers that he would wish to have the estate shared in accordance to the wish of the deceased by having land surveyed in accordance with the existing boundaries. He further deponed that the estate is comprised of L.R. No. NTIMA/NTAKIRA/916 measuring approximately 8.8. acres and he proposed the same be shared among 7 beneficiaries all being deceased dependants. The petitioner on his part listed the 7 beneficiaries including M’Mbui M’Muga, now deceased. He agreed the deceased estate comprised of L.R. No. Ntima/Ntakira/916 measuring 3.612 Hectares and proposed that each of the 6 children of the deceased get 1 ¼ acres whereas the grandson gets ¼ of an acre. The objector in his objection terms himself as a beneficiary as the petitioner herein Geoffrey Kirai Muga sold to him ¼ of an acre out of the deceased estate and the agreement was reduced down in writing. That the 1st objector, as a purchaser paid Kshs.74,000/= to the petitioner who promised to effect transfer of the ¼ of an acre into the 1st objector’s name during the confirmation of the grant. The petitioner has refused to honour the agreement and now offers to refund the purchase price whereas the 1st objector insists that he should get his ¼ of an acre registered in his name.

The 1st protestor seeks 2 acres on the ground that the deceased during his lifetime he showed all his beneficiaries respective portions and put boundaries and beacons for each portion and that each beneficiary live in accordance with the wish of their deceased father and they have put up permanent structures on their respective portions. He insisted that he is entitled to 2 acres and the rest of the beneficiaries should share equally the rest of the land.

I have carefully considered the proposed mode of distribution that the respective parties have put forward and their affidavits in support of scheme of distribution and the protest as well. I have considered the written submissions by the respective counsel for the respective clients and the oral submissions for and against the application and mode of distribution by each party.

The issues for consideration in this cause are:-

(a) Whether the mode of distribution proposed by respective opposing parties are fair and reasonable and whether they should be adopted or not?

(b) Whether court can adopt another mode of distribution other than the ones proposed by the parties if the proposals by the parties herein are not fair and reasonable?

(c) Whether the 1st objector is entitled to the portion he purchased from the petitioner in this cause and if not so what is he entitled to?

The petitioner proposes to have the estate of the deceased distributed equally amongst the deceased sons and daughters, however when it came to the deceased grandson who is supposed to take his late mother’s share he proposes he gets ¼ an acre. No reason has been offered while the grandson who has known no other home other than his grandfather’s home should get ¼ of an acre and why his later mother’s share should be ¼ of an acre whereas the other sons and daughters get 1 ¼ of an acre.

Article 27(1), (4) and (5) of the Constitution of Kenya, 2010 recognizes all children as equal and I do not see why some of the children of the deceased should be discriminated as per petitioner's scheme of distribution.

Article 27(1), (4) and (5) of the Constitution provides:

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(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)."

In view of the provisions of the Constitution of Kenya, 2010, I find and hold that the scheme of mode of distribution proposed by the petition to be untenable as it discriminates against the grandson who is supposed to take equal share in respect of his mother's share. On the proposal by the 1st protestor to have 2 acres distributed to him as per the wish of the deceased, the 1st protestor did not provide any evidence indeed that his father allocated to him two acres and that his step brothers and sisters were also allocated portions of land and of what size. He proposes that he gets 2 acres and his step-brother and sister's share, the rest of the land equally as per his submissions. In his affidavit he did not mention the size of the portion of land allocated by the deceased to each of his children. He did not mention the size of the land occupied by each child. I am not convinced that the deceased during his life time shared his land to his children as alleged by the 1st protestor but he might have shown his respective children were to put up their residential houses and a portion to use or occupy pending future distribution. I therefore do not find the 1st objector's proposal fair and reasonable as it would mean that he would get double what other beneficiaries would each end up getting after sharing the land equally as per his proposal.

The 1st objector concedes that he is a purchaser of ¼ of an acre from the 1st petitioner as per sale agreement dated 18th June, 2011. The deceased herein passed on 10th August, 1990 long before the 1st objector purchased the said ¼ of an acre, therefore he never dealt with the deceased proprietor in anyway as regards the alleged purchase of a ¼ of an acre. The 1st objector cannot in anyway claim to be a creditor to the deceased estate as envisaged by Section 66 of the Law of Succession Act. The 1st objector therefore cannot be heard to claim that he has any claim directly against the estate of the deceased. The 1st objector purchased ¼ of an acre from the petitioner who had by virtue of **Section 82 of the Law of Succession Act** no capacity to sell any immovable property from the deceased estate.

Section 82(b) of the Law of Succession Act provides:

"82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

(a).....

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that-

(i) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) No immovable property shall be sold before confirmation of the grant;

In view of the foregoing the 1st objector is an intermeddler and stranger to the deceased estate as he is neither a beneficiary nor a creditor. This is a succession cause and in hearing such a cause the court's role is to determine who are the administrators and beneficiaries of the deceased estate, the properties that comprises the deceased estate and the mode of distribution when distributing the properties that comprise the estate of the deceased to the dependants of the deceased estate.

The 1st objector claim as a purchaser of ¼ of an acre from one of the beneficiaries Geoffrey Kirai M'Muga from part of the property that comprise part of the deceased estate. The share of the said petitioner/beneficiary is subject of determination in this cause the 1st objector can wait for the court's determination, on the mode of distribution then his cause of action can only arise after the determination of this cause (if any) and against the said Geoffrey Kirai M'Muga in a different cause but not in this succession cause. The 1st petitioner is after all a party in this cause and the 1st objector can await and find out after distribution whether 1st petitioner would meet his part of the agreement in default he would be better advised to file fresh suit to claim what he shall deem fit and just depending on his cause of action. In the circumstances the 1st objector's objection is misplaced and is dismissed with no order as to costs.

As regards the mode of distribution of the deceased estate, I find that all the deceased dependants who as per **Section 29 of the Law of Succession Act** include the grandchildren, where their parents, have died before the distribution of the estate, to be entitled to share the deceased estate.

In the interest of fair and reasonable distribution I will direct and order that parcel No.NTIMA/NTAKIRA/916 be shared equally among the following beneficiaries of the deceased as follows:-

(a) (i) Susan Munyange M'Mbui substituted for her late husband M'Mbui M'Muga - 1.25 Acres

(ii) M'Mbutura M'Muga - 1.25 Acres

(iii) Kaaria M'Muga - 1.25 Acres

(iv) Geoffrey Kirai - 1.25 Acres

(v) Stanley Kimaita - 1.25 Acres

(vii) Esther Ngiriki - 1.25 Acres

(vii) Joel Kimathi - 1.25 Acres

(b) The first objector's claim be and is hereby dismissed with no order as to costs.

(c) As the parties are all related and the subject matter is estate of the petitioner's and 1st protestors late father each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 25TH MARCH OF 2014

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:

1. Mr. L. Kimathi for objectors/respondents

2.A. Anampiu for the petitioner

J. A. MAKAU

JUDGE