



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 499 OF 2010

MIKIELINA KIRIGO M'MURITHI.....PETITIONER

VERSUS

MARY GATUKU.....OBJECTOR

RULING

The petitioner Mikielina Kirigo M'Murithi through a petition for grant of letters of administration intestate dated 21/10/2010 presented the petition for estate of MBOROKI MWORIA IRETHIUI in her capacity as the wife of the deceased. She indicated in her petition that the deceased was survived by James Gitonga Murithi, Lawrence Koome Murithi, Charles Mutwiri Murithi and Patrick Kirea Daniel as his sons. The petition was gazetted in the Kenya Gazette of 1/4/2011 under Gazette Notice No.3341. The objector filed an objection by virtue of Section 67 of the Law of Succession Act.

That on 3rd October, 2011 court directed that the objection be heard by way of viva voce evidence. The objectors gave evidence and called no witness whereas the petitioner gave evidence and called four witnesses.

OW1 Mary Gantuku Mukiri testified that the petitioner is their sister-in-law being wife to their late brother one M'Murithi. She testified that their father's name is BOROKI MWORIA IRETHIUI and had passed on in 1976. According to OW1 the deceased Boroki Mworia Irethiui was survived by:-

1. ***Manene Kithinji(deceased) now survived by the petitioner Mikelina Kirigo M'Murithi.***
2. ***Marithe Igoji***
3. ***Mary Gantuku.***
4. ***Jennifer Tirindi Mwamba***

OW1 further testified that her father's assets comprised of L.R Abothuguchi/Gitie/230 and 231. That her father's wife was called Teretha Mukami and not Mikelina Kirigo, the petitioner who is daughter in-law to her deceased father. She objects to the making of the grant to the petitioner because she did not inform the objectors or seek their consent when she petitioned for grant of letters of administration intestate to the deceased estate whilst she knew the objectors were entitled to a share to the deceased estate. She contended the contents of Form P&A 5 as filed by the petitioner is false as regards the deceased heirs. During cross-examination the 1st objector testified that the deceased had given the objectors ½ an acre and their brother 2 acres but the petitioner sold the objector's share.

OW2 Jennifer Tirindi Mwamba adopted the evidence of OW1 Mary Gantuku Mukiri. She testified that

she would prefer the grant of letters of administration of her father's estate to be given to the petitioner and Mary Gantuku Mukiri.

The petitioner gave evidence as PW1 and called four witnesses. The petitioner's case is that Mboroki Mworira Irethiui was her uncle and her father-in-law's name was Mworira and that plot Abothuguchi/Gitie/230 belonged to her uncle Mboroki Mworira. That the family of Mboroki Mworira Irethiui allowed her to petition for the grant of the deceased uncle. She admitted that Form P&A 5 is false as regards the deceased heirs. She admitted she is not widow of the deceased in this petition. She however agreed with OW1 on the heirs to the deceased Mworira Irethiui. She admitted the objectors are her sister's in-law and that she did not inform them when she petitioned for the grant. During cross-examination PW1 admitted Abothuguchi/Gitie/ 250 was a property of the father to the objectors and that the heirs are the objectors and herself. PW2 Tarasia Mburu testified that the objectors and the petitioner are her nieces. She testified the land in question though in her late husband's name belonged to the father of the objectors and father in-law to the petitioner the late Mworira Irethiui and as such the petitioner petitioned for the ground to have the land transferred into her name. she confirmed the petitioner is not wife to the deceased as alleged in the petition.

PW2 in cross-examination by the objectors confirmed the father of the objectors was Boroki Mworira Irethiui. Even when examined by court she insisted the name of the father of the objectors was Mboroki Mworira Irethiui. PW3 testified the land in dispute belonged to Mboroki Mworira Irethiui who he confirmed was father to the objectors and father in-law to the petitioner. He testified that he does not know whether the petitioner sought consent of the objectors to the petition for the grant. PW4 testified Abothuguchi/Gitie/230 was registered in the name of Mboroki Mworira Irethiui, uncle to the objectors and the petitioner and that he was present when PW2 allowed the petitioner to petition for grant of letters of administration over her husband's estate. During re-examination PW4 admitted Abothuguchi/Gitie/230 though in the name of husband of PW2 is a property of the family of the objectors and the petitioner. PW5 testified that both the objectors and the petitioner are children of M'Mworira Irethiui. He stated he did not know how the petition was filed before this court.

I have briefly summarized the evidence adduced before me by both the objectors on one side and the petitioner on the other. The issue for determination in this objection are as follows:-

1. ***Whether the petitioner is the right person to petition this court for grant of letters of administration in exclusion of the objectors?***
2. ***Whether the petitioner sought consent or renunciation from the objectors before petitioning for the grant.***
3. ***Who should be the administrators?***

There is no doubt from the evidence of the objectors and that of PW2 and PW3 that the deceased Mboroki Mworira Irethiui was father to the objectors and father in-law to the petitioner. I do not accept the petitioner's evidence, and that of PW4 and PW5 that Mboroki Mworira Irethiui was not the father to the objectors but their uncle. PW1 has admitted having made false statements in the forms for petition for grant by describing herself as widow and declaring her children as sons of the deceased a point which all her witnesses stated on oath was false.

PW4 admitted that he did not know whether the father of the objectors had other names. In view of the foregoing I do not believe PW1, PW4 and PW5 to be credible witnesses and worthy believing. The objectors, PW2, PW3, PW4 and PW5 all testified that Abothuguchi/Gitie/230 was property of the father of the objectors whether in his name or not and that the objectors and the petitioner are the rightful heirs.

I therefore find that Abothuguchi/Gitie/230 comprised of part of the assets of the father of the objectors herein whether he is referred by the name of Mboroki Mworira Irethiui or Mworira Irethiui and should be inherited by his children.

Section 29 of the Law of Succession Act gives the meaning of "dependent" as :-

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

In view of the above-mentioned Section I am satisfied that the petitioner being daughter in-law to Mboroki Mworira Irethiui and the objectors being daughters of Mboroki Mworira Irethiui are dependants to the deceased estate as defined under Section 29 of the Law of Succession Act.

Section 66 of the Law of Succession Act sets out the Order of preference to be given in petition for the grant. **Section 66(a) and (b) of the Law of Succession Act** provides:-

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and (d) creditors: Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

Rule 7(7)(a), (b) and (c) of the Probate and Administration Rules provides:

(7) Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has-

(a) renounced his right generally to apply for a grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.

The petitioner in this cause did not rank higher than the objectors in priority and in seeking a grant to administration intestate and was required before the making of the grant to furnish this court with information and satisfy the court that the objectors having prior preferences to a grant being daughters of the deceased had renounced their right generally to apply for the grant or had consented in writing with making of the grant to the petitioner or that they had been issued with a citation calling upon them either to renounce such right or to apply for a grant. The petitioner did not in the instant petition comply with the mandatory provisions of Rule 7(7) of the Probate and Administration Rules.

The petitioner did not seek the consent of the objectors nor did she issue any of them with citation calling upon them to either renounce their rights to petition for the grant or apply for the same. That none of the objectors renounced their right generally to apply for grant. I therefore find the petitioner acted in contravention of the mandatory provisions of **Rule 7(7) of the Probate and Administration Rules**. I also find and hold the petitioner is not the right person for the grant of letters of administration intestate of the estate of the deceased herein in exclusion of the objectors.

Section 66 of the Law of Succession Act, which I have already quoted herein above, where the deceased had died intestate the court has final discretion as to the person or persons to whom grant of letters of

administration shall, in the best interest of all concerned be made but without prejudice to the discretion, accept as general guide the order of preference set out under the said Section. In this case, I have considered the evidence of the objectors and that of the petitioner and her witnesses. OW2 wishes the administrators of her father's estate to be the petitioner and the 1st objector. All agree that they are entitled to the deceased estate though the parties do not agree to what extent. I have observed their demeanour and I am satisfied the two can worktogether for the proper administration of the deceased estate. I therefore in exercise of my discretion and in the best interest of all the beneficiaries to the deceased estate appoint Mary Gantuku Mukiri and Mikelina Kirigo M'Murithi as joint administrators to the estate of Mboroki Mworira Irethiui.

The upshot of the matter is that the objection is allowed and I make the following orders:-

1. *Mary Gantuku Mukiri and Mikielina Kirigo M'Murithi are appointed as joint administrators to the estate of Mboroki Mworira Irethiui.*
2. *That temporary grant of letters of administration intestate do issue to Mary Gantuku Mukiri and Mikielina Kirigo M'Murithi.*
3. *That since the parties are sisters and sister-in law I order each party to bear its own costs for the sake of family unity.*

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

J. A. MAKAU

JUDGE

Delivered in Open Court in the presence of:

1. Objectors in person – present
2. Petitioner in person – present

J. A. MAKAU

JUDGE