



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO.96 OF 2008

IN THE MATTER OF THE ESTATE OF: MARETE ING'ENTU alias

M'MARETE M'INGENTU(DECEASED)

VERSUS

VICTOR MUGIRA MARETE.....PETITIONER

PATRICK KIRUJA KITHINJI.....OBJECTOR/CO-PETITIONER

R U L I N G

The 1st petitioner through summons for confirmation of grant made to him and his co-petitioner herein sought the grant to be confirmed and the deceased estate who passed on intestate be distributed in terms of his supportive affidavit dated 30th November, 2009.

The co-petitioner PATRICK KIRUJA KITHINJI filed objection to the mode of distribution proposed by the 1st petitioner and in his proposal he is in agreement with the scheme of distribution proposed by the 1st petitioner as regard to L.R. No. Abogeta/L.Kithangari/328 but is opposed to the scheme in respect of L.R. No.Abogeta/L.Chure/333 as proposed by the 1st petitioner.

The estate subject of the application for confirmation of the grant is that of Marete Ingentu alias M'Marete M'Ingentu who died intestate on 12th August, 1992. That both parties are in agreement as to the deceased dependants and assets of the deceased. The only disagreement between the 1st petitioner and 2nd petitioner/objector is on distribution of L.R. No.Abogeta-Chure/333.

The objector/petitioner proposes Land Parcel Abogeta-Chure/333 be shared so that Maria Marete together with all other daughters of the deceased namely:- Ann Mwari, Beatrice Kabiti, Kagwiria Marete and Kagutu Marete get ¼ acre(life interest) Victor Mugira Marete 2.36 acres and Patrick Kiruja Kithinji 2.36 acres as joint owner and trustee for the three brothers namely:- Henry Kimathi Kithinji, Antony Mutugi Kithinji and Jacob Gitonga Kithinji. The 1st petitioner Victor Mugira Marete on his part proposes that L.R. Abogeta/L-Chure/333 be transferred to him absolutely.

I have carefully considered the application for confirmation of the grant. The affidavits in support and protestor's replying affidavit. The court has also considered the written submissions by Counsel in support of their respective opposing positions.

The issue for determination is whether the proposal by the parties is fair and reasonable and which of the two proposals would ensure just and equitable distribution of the deceased estate.

There is no dispute in this application as to who the deceased beneficiaries are. All the listed beneficiaries are children, wife and grandchildren of the deceased. The grandchildren being children of the deceased Daniel Kithinji Marete. All the above beneficiaries are by virtue of the provisions of sections 29 of the Law of Succession Act "**dependants**" to the deceased estate.

Section 29(a) and (b) of the Law of Succession Act provides:-

For the purposes of this Part, "**dependant**" means-

(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;

(b) Such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and....."

I therefore find that all the listed dependants are entitled to the deceased estate. I note that both the 1st petitioner and 2nd petitioner/objector are in agreement to the mode of distribution as regards L.R NO.Abogeta/L.Kithangari/328 and as such there is no issue for this court to determine as regards shares or distribution in respect of the said property.

As regards L.R. No.Abogeta/L.Chure/333 the 1st petitioner proposes to have the whole land transferred into his name. In his replying affidavit dated 23rd November, 2009 he has not given any reason as to why he should have the whole land comprising of 4.97 acres transferred to himself alone, in addition to one (1) acre from L.R. No.Abogeta/L-Kithangari/328. He has not even considered his sister's interests as children of the deceased who are by virtue of Section 29 of the Law of Succession Act entitled as dependants of the deceased. The objector is of the view that the five deceased daughters should get ¼ acre(life interest) and he shares the balance with the 1st petitioner so that each gets 2.36 acres.

I have very carefully considered the deceased daughters are married and that the proposal by both petitioners that the deceased daughters get ¼ acre (life interest) to be unfair and discriminatory on the grounds of sex and marital status. The scheme proposed by the 1st petitioner and petitioner/objector to say the least is against Article 27 of the Constitution of Kenya which provides :

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

The petitioner in his application for confirmation of the grant did not comply with the provision of Rule 40(8) of the Probate and Administration Rules which provides as follows:-

"(8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be

set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.”

In the instant application the petitioner did not secure the consent from all the beneficiaries to the mode of distribution and confirmation of the grant in terms of Rule 40(8) of the Probate and Administration Rules. It cannot therefore be said all beneficiaries are in agreement with the proposed scheme of distribution by the 1st petitioner and the petitioner/objector.

I will therefore in the interest of justice consider the schemes as proposed, however, I have to consider the deceased five(5) daughters though married need a slightly bigger portion than suggested by the petitioner/objector. I am not convinced the scheme proposed by the 1st petitioner to be fair and reasonable as regards Abogeta/L-Chure/333.

In view of the foregoing I find the scheme of distribution in respect of Abogeta/Lower Kithangari/328 to be fair and reasonable and will adopt it.

The upshot is that the deceased estate shall be distributed amongst the beneficiaries/heirs as follows:-

- a. ***Abogeta/Lower Kithangari/328 Karimi Marete - 0.223(life Interest) that upon her demise the widow's share of 0.233 acres should go to Patrick Kiruja and his brothers Henry Kimathi Kithinji, Antony Mutugi Kithinji and Jacob Gitonga Kithinji***
- b. ***Victor Mugira -1 acre***
- c. ***Patrick Kiruja Kithinji - 1 acre as joint owner and trustee to Henry Mutugi Kithinji, Antony Mutegi Kithinji and Jacob Gitonga Kithinji.***
- d. ***Abogeta/Chure/333***
 - a. ***Maria Kaimuri Marete, Ann Mwari Beatrice Kabiti, Kagwiria Marete and Kagutu Marete – 0.97 acres.***
 - e. ***Victor Mugira Marete - 2 acres***
 - f. ***Patrick Kiruja Kithinji – 2 acres as joint owner and trustee to Henry Kimathi Kithinji, Antony Mutugi Kithinji and Jacob Gitonga Kithinji***
 - g. ***That as parties are son and grandson to the deceased I order that each party bears its own costs.***

DATED, SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF MARCH, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. ***Mrs. Kaaria h/b for Mr. A. Kiautha for the 1st petitioner***
2. ***Mr. L. Kimathi for the petitioner/objector***

J. A. MAKAU

JUDGE