



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI**

**SUCCESSION CAUSE NO: 2799 OF 2008**

**IN THE ESTATE OF DORCAS MBERE GATONGU– (DECEASED)**

**RULING**

Dorcas Mbere Gatongu died on 10th July 1988. Representation to her estate was sought on 20th February 2009 by Josephine Muthoni, in her capacity as daughter of the deceased. Her petition disclosed Mary Njoki, Muchiri Njue, Betty Wangui Ngacha, David Njagi, Rhoda Rwamba Rehema, Samuel Njiru, Margaret Wanjiku and Josephine Muthoni as the children who survived her. She was said to have died possessed of one asset – Plot No. D5 -355 Kayole Estate. Grant of letters of administration intestate in respect of her estate was made to Josephine Muthoni on 21st July 2009.

On 29th September 2010, the administrator of the estate, Josephine Muthoni filed a Eummons for Confirmation of Grant, of even date. In the application she identified herself and her seven (7) siblings as the survivors of the deceased. She also disclosed that the only asset making the estate was Plot No. D5 – 355 Kayole Estate. She proposed that it should devolve upon her absolutely.

The reverse of the court's copy of the summons dated 29th September 2010 shows that only Rhoda Rwamba, Margaret Wanjiku and Mary Njoki appeared to be aware of the application. There are two consent forms filed together with the summons. Only two of the seven siblings of the administrators signed these consents, that is Muchiri Njue and Rhoda Rwamba Rehema.

When the confirmation application came up for hearing on 15th February 2011, Rhoda Rwamba, Mary Njoki and Margaret Wanjiku showed up and voiced their opposition. The court registered the dispute and directed that application be disposed of by way of *viva voce* evidence. The matter came up again on 30th May 2011 when Rhoda Rwamba, Mary Njoki and David Munyi (son of Margaret Wanjiku) attended and indicated to the court that they were still not agreeable to the proposed mode of distribution. They were directed to file affidavits of protest.

Mary Njoki is the only one who filed an affidavit of protest, sworn on 10th June 2011 and filed in court the same day. She complained that the Summons for Confirmation was filed without notice to the other family members, hence they did not sign consents to support it. She stated that she and her siblings were not agreeable to the mode of distribution proposed in the application and averred that they preferred that the property be sold and the proceeds divided equally amongst all the children of the deceased or their survivors.

The matter came up for hearing before me on 15th April 2013. Only two of the surviving children of the deceased turned up – the administrator, Josephine Muthoni, and the protester, Mary Njoki. Both gave sworn oral evidence. Her case was that she helped the deceased acquire the property from the City Council of Nairobi as she contributed some money. When the deceased died the City Council of Nairobi threatened to dispose of the plot over unpaid rates. She turned to mobilise her siblings to raise money to save the property, but none of them was interested. She was forced to borrow from her employer. She

paid off the council and saved the property. She thereafter continued to pay the rates as when they fell down.

The protester on the her part conceded that the administrator did in fact pay some money to the council to save the property. She was aware of the danger of the asset being sold over the accumulated arrears of rates and other charges, but she had a heavy burden of raising her children, and therefore she could not contribute to the protection of the property. She nonetheless asserted that the property was allotted to their mother and had remained in her name up to her death. It was therefore an asset in her estate available to all her children. She proposed that the property be sold and the proceeds shared out between the children after surviving the administration expenses.

The material placed before me shows that the property – Plot No. D5 -355 Kayole – was allotted to the deceased, Dorcas M. Gatongu. Her Account Number was 945355. It is not very clear the amount of money she paid to the council for the same; but there is evidence that as at 18th July 1996 there was still a principal balance on the plot. Together with other charges the council was demanding Kshs.43,273.60. By this time the allottee was already dead. The administrator produced receipts at the hearing to demonstrate that she did pay some money to clear this outstanding amount. The receipts are dated 24th July 1996. The fact of these payments is not in dispute. I am therefore satisfied that the property was allocated to the deceased, but the administrator did contribute to some extent, especially after the demise of the deceased. The extent of the said contribution is however not certain. Since the property was allotted to the deceased, and she paid a portion of the money required for its acquisition, and since it remained in her hands until her death in 1988, it forms part of her estate, and it is therefore available for distribution amongst her children.

The deceased died in 1988 after the law of Succession Act had come into force, and therefore by virtue of **Section 2(1)** of the said Act, the law applying to her estate is the Law of Succession Act. She died intestate and therefore distribution to her estate should follow Part V of the Law of Succession Act. It would appear that she was a single woman, she was therefore survived by children without a spouse. Consequently, **Section 38** of the Act applies. **Section 38** provides that:-

***“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children”.***

The asset in question should therefore be dealt with in terms of **Section 38** of the Law of Succession Act. The only challenge is that the administrator, Josephine Muthoni, had incurred expenses in salvaging the property from the City Council of Nairobi. Any distribution of the property must take into account the said expenses.

The final orders that are made in this case, taking into account all what I have stated above, are:-

1. That the administrator, Josephine Muthoni shall prepare and file in court within 30 days of this judgment an account of all the monies that she has expended on Plot No. D5 – 355 Kayole Estate upto the date of the said account.
2. That thereafter the administrator shall dispose of the said Plot No. D5 – 355 Kayole by sale to the highest bidder.
3. That the proceeds of the said sale shall be deposited in an interest-earning estate bank account in the name of the administrator who shall thereafter file in court a statement on the said sale and the opening of the said estate account within seven (7) days of the said sale.
4. That the matter shall thereafter be mentioned in court for directions on distribution.
5. That this matter shall be mentioned on 31st July 2013 to confirm whether the administrator has completed with Order 1 above.
6. That this being a family matter, there shall be no order as to costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 12th DAY OF July, 2013.**

**W. M. MUSYOKA**

**JUDGE**