



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Succession Cause 1763 of 2008

IN THE MATTER OF THE ESTATE OF KING'ARA KIMERIA –(DECEASED)

RULING

The protester in the summons for confirmation of grant dated 4th June 2010 is the sister of the 1st administrator (Kamau Kingara), Wanjiku Kingara and Wamaitha Kingara, all children of one of the deead's two wives (also deceased). The three are the step-sisters and step-brother of the 2nd administrator (George Kungu Kingara), Wanjiku Kingara and Wanjiku (Wanjiru?) Kingara. The eight are the only surviving children of the two houses of the deceased's polygamous household.

The protestor is claiming $\frac{1}{2}$ of the estate available for distribution to her late mother's household on the ground that she is unmarried and therefore entitled to an equal share of the said estate with her brother, the 1st administrator. She therefore objects to the attempts by the two administrators to give her only $\frac{1}{8}$ of her fathers' estate whilst giving the bulk of her household's entitlement to the 1st administrator. The grant in respect of the estate in question was issued on 3rd February 2000 and is yet to be confirmed. On 20th April 2010 the court directed that the summons for confirmation be filed within 30 days, which the petitioners did on 7th June 2010. Thereafter submissions were filed on the only issue arising, which has to do with the mode of distribution of the estate.

The only reason advanced by the two administrators as to why the applicant should get only ? of the estate is that she is married and would inherit from or through her husband. The protester filed her affidavit of protest on 22nd June 2010 in which she depones that she is not married and that she has been in occupation and cultivation of the portion in question with the mother (now deceased). She holds the view that being a daughter of the deceased and unmarried, she is entitled to an equal share of the estate property (devolving to her mother's house) with the 1st administrator, stating that the proposed mode of distribution, which seeks to give the latter a larger share is discriminatory. She contends that if the same is approved then she would suffer loss by being disinherited.

The deceased's estate comprises of two parcels of land namely;

KIAMBAA/MUCHATHA/T.67 and KIAMBAA/THIMBIGUA/1187 which the administrators propose to distribute as follows:

1. KIAMBAA/MUCHATHA/T.67 to the administrators in equal shares.
2. KIAMBAA/THIMBIGUA/1187 as follows:
 - (i) ½ acre to George Kungu Kingara
 - (ii) ? to Kamau Kingara
 - (iii) ? to the protestor

The respondents' only response to the protest, as appearing in the replying affidavit filed on 13th July 2010, is that the protester is married and would inherit property at her place of marriage.

Written submissions were exchanged and filed in the matter. To support her claim the protester relies on the following authorities:-

1. *The constitution of Kenya 2010; Articles 27 and 60*
2. *The succession Act (Cap 160); Sections 2(2) 38, 40, 41 and 42.*
3. *The Judicature Act (Cap 8); Sections 3(2).*
4. *Monica Wambui Rua –vs- Stephen Nduati Rua H.C.C.A. No. 408 of 1988 ([2004] eKLR)*
5. *Nyeri H.C. Succ. Cause No. 204 of 2005*

In the matter of the estate of David Mathini Wambugu (Deceased) [2008]eKLR

6. *Nairobi Succ. Cause No; 706 of 2000*

In the matter of the estate of Priscilla Wairimu Kamau (Deceased) [2005] eKLR

7. *Meru Succ. Cause No. 308 of 1991*

In the matter of the estate of Rukunga Kaimathiri (Deceased) [2011]eKLR

The respondents (petitioners) have not cited any authorities but do accept that the protester is constitutionally entitled to inherit the deceased's land, only arguing that the mode of distribution should be as proposed by them, since she is married to one James Murigi but separated and living at her parent's home. They have submitted, without proof, that she is awaiting to resolve existing differences with the alleged husband. They hold the view that ? of her father's estate is "**commensurate with her status**" and in the same breath submit that the distribution is not discriminatory.

I find the petitioners' reasoning self defeating in that they recognise the protestor as being entitled to inherit their fathers' land by virtue of her living at her parents' home, unlike the other sisters who have raised no claim, presumably because they believe they are not entitled to inherit. The respondents' contention that the protester is not entitled to any portion of KIAMBAA/MUCHATHA/T.67 (despite their not disputing that she occupies a ¼ thereof, which belonged to her mother) is founded on the ground that the mother only had a life interest and that the said portion reverted to the estate after her demise. I find the protester not to have any quarrel with this argument since it is for the same reason she considers the said portion as being available for contribution.

The proposal to grant the protester a much smaller portion of her father's estate on the basis that the same is considered to be "***commensurate with her (marital) status***" is clearly discriminatory in light of Article 27 sub-articles (1) (4) and (5) of The Constitution of Kenya 2010 and violates the provisions of Article 60(f) of the Constitution. It goes contrary to the provisions of Section 38 of the Succession Act which provides that among the children of a deceased intestate (if there be more than one) the net intestate estate shall be divided equally among the surviving children.

The net estate of the deceased comprises of the two parcels of land, KIAMBAA/MUCHATHA/T.67 and KIAMBAA/THIMBIGUA/1187 which the contestants have agreed to share equally among the two houses. I am not persuaded that such an agreement can stand in view of Section 40 of the Succession Act which provides that in the case of a polygamous household, the net intestate estate shall in the first instance, be divided among the houses

"according to the number of children in each house, but also adding any wife surviving the intestate as an additional unit to the number of the children".

My understanding of this is that parliament intended that the provisions of Section 38 be given effect even in the case of polygamous households where the children would also share equally.

It would appear from the documentation filed that the intestate was predeceased, by his two wives. The number of children has been given as 4 in the 1st house and 3 in the 2nd house. This clearly means therefore, that there are seven units in the intestacy. My interpretation of this, provision, as I have held elsewhere, is that the household with more children (units) would receive more than the one with the fewer. Within the household however, the children would then share the estate equally, but with the right to renounce one's entitlement in favour of others and the filing of necessary consents in that respect. This being the case it is clear to me that the common practice where intestacies in polygamous households are shared equally between the households is not only illegal but clearly inequitable. It violates the letter and spirit of Section 38 of the Succession Act, and defeats the purpose thereof.

In the circumstances I find that the protester succeeds in her application. There is clear discrimination and her right to inherit her father's estate is jeopardized. I find that the proposed mode of distribution contravenes not only the Constitution of Kenya 2010, but also the Succession Act itself.

Moreover the summons for Confirmation of Grant dated 4th June 2010 does not confirm to the requirements of the Succession Act in that the affidavit in support does not name all the surviving beneficiaries, their interest (if any) their renunciation thereof or their respective consents to the proposed mode of distribution. For this reason the same is hereby struck out.

I order that the administrators do file an appropriate summons for Confirmation of Grant taking into account the legal provisions as considered herein.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 7th DAY OF June, 2012.

M.G. MUGO
JUDGE

In the presence of :

for the applicant.

for the respondents.