



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Succession Cause 296 of 1997

IN THE MATTER OF THE ESTATE OF SUSAN KABURO GITUOKI.....DECEASED

ESTHER KAGURI GITUOKIAPPLICANT

VERSUS

SIMION MWITI GITUOKIRESPONDENT

RULING ON DISTRIBUTION

1. On 11.10.2006 I revoked the grant of letters of administration issued to Simon Mwiti Gatuoki and instead ordered that he and his sister, Esther Kaguri Gituoki be issued with fresh letters of administration and to administer the estate herein, jointly. I also ordered that parties do agree on the mode of distribution of the deceased's estate failure to which any of them would move the court so to do. Esther Kaguri Gituoki aforesaid did so by filing an Application for confirmation of grant on 22.2.2007 At paragraph 7 of her Affidavit sworn on 22.2.2007 she proposes distribution as follows:-

“ LAND PARCEL NO. KIIRUA/NAARI/795 measuring 2.09 hectares to be shared as follows:-

- (i) **Simon Mwiti to get 2 acres**
- (ii) **Patrick Mwenda to get ½ acre”**
- (iii) **Gitobu Kiruki, Mercy Gacheri Kiruki, Bundi Kiruki and Kairuthi Kiruki to get ½ acre.**
- (iv) **Esther Kaguri Gituoki to get ½ acre**
- (v) **Kithinji Gitonga and Kagwiria Gitonga to get ½ acre**
- (vi) **Rebecca Mukiri to get ½ acre”.**

2. Simon Mwiti did not respond to the Application although on 21.5.2007 I did order that he files his proposal on distribution within 7 days and set down the matter for mention on 31.5.2007 to enable him comply. He failed to do so and on the application of Mr. Mburugu for Esther, I retired to consider the matter hence this Ruling.

3. From the oral evidence tendered before me earlier in this Cause, the only asset comprised in the estate is land parcel Number Kiirua/Naari/795 measuring 4.5 acres or thereabouts. I have elsewhere above set out the proposal by Esther which is consistent with the evidence she tendered in court. Mwiti's proposal in evidence was that he is entitled to 4 acres while all his sisters namely Esther Kaguri Gituoki, Rosalia Mwarania, Rebecca Mukiri and Isabella Kanja should inherit ½ acre jointly. That Patrick

Mwenda, his nephew, is not entitled to any part of the estate as his father is alive and he can inherit his father's land. More importantly however, he was categorical that as the only surviving son of the deceased, he was entitled to a larger share of the estate than his sisters and that the deceased never intended that he should have only 2 acres as indicated by his sister, Esther.

4. My view in this matter is very straight forward; the only reason that Mwiti wants 4 acres of the land is because he is the only son of the deceased. That in his view, his sisters cannot get more than ½ acre jointly because they are women and some are married but he admits that they use part of the land for farming. Further, that although Patrick Mwenda was born by his sister, Esther and was living with the deceased, he had no rights at all to inherit the deceased's land. On all fronts however, Mwiti's arguments and proposals are neither backed by the facts of this matter nor the law.

5. On the facts, I believe the evidence of Esther that in fact the deceased specifically determined that Mwiti should get 2 acres of her land and that the daughters as well as her dependant, Patrick Mwenda should each get ½ acre. I note that the deceased in fact applied for sub-division of the land to the Miriga Mieru West Land Control Board and (Exh.2A) and a Mutation Form was prepared in that regard (Exh.2B) Mwiti has not challenged the authenticity of these documents nor the Letter of consent dated 5.9.1996 (Exh.3) Mwiti has also not challenged (Exh.8) a document in which the deceased determined the sharing of her land in the event of her demise, which document is consistent with Esther's proposal on distribution. In the end therefore the facts prior to the deceased's death do not bear out Mwiti's selfish and individualistic nay chauvinistic wishes.

6. On the law of Succession the Act provides as follows;

“S38 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.”

7. The Section does not in any way discriminate between the children of a deceased person according to their sexes or marital status. Similarly, it would offend the provisions of s70 and s.82(3) of the Constitution if an individual like Mwiti is allowed to use the courts to propagate discrimination for any of the reasons therein set out s. 82(3) of the constitution for avoidance of doubt reads as follows:

“In this section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race tribe, place of origin or residence or other local connexion, political opinions, colour creed or sex whereby persons of one such description are subjected to disabilities or restriction to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded person of another description”

8. In taking this view, I am aware of the law as set out in Rono vs. Rono [2006] eKLR where it was held inter alia that the distribution of a deceased's estate should not be affected by the sex or marital status of the deceased's children.

9. As I indicated earlier, there has been no response to the proposal by Esther and even if there was, I do not see how I can fault that proposal.

10. In the end, I will allow the Application for confirmation of grant dated 22.2.2007 and order distribution of the deceased's parcel of land No. Kiirua/Naari/795 as follows:-

LAND PARCEL NO. KIIRUA/NAARI/795 measuring 2.09 hectares to be shared as follows:-

- (i) **Simon Mwiti to get 2 acres**
- (ii) **Patrick Mwenda to get ½ acre”**
- (iii) **Gitobu Kiruki, Mercy Gacheri Kiruki, Bundi Kiruki and Kairuthi Kiruki to get ½ acre**

jointly.

(iv) Esther Kaguri Gituoki to get ½ acre

(v) Kithinji Gitonga and Kagwiria Gitonga to get ½ acre jointly.

(vi) Rebecca Mukiri to get ½ acre”.

11. As to costs, the parties are siblings and I do not see that the dispute should be extended further into the question of costs. Let each bear his/her own costs

Orders accordingly.

Dated, signed and delivered in open court at Meru this 12th day of July 2007.

ISAAC LENAOLA

JUDGE

In the Presence of

Mr. Kiogora h/b for Mrs. Gitonga Advocate the Petitioner

Mr. Mburugu Advocate for the Objector

ISAAC LENAOLA

JUDGE