



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 29 OF 2006

IN THE MATTER OF THE ESTATE OF M'MWAMBA M'MUNYUA (DECEASED)

AND

IN THE MATTER OF PROTEST

BETWEEN

SAVERA KATHURE.....1ST PROTESTOR/APPLICANT

STANLEY GATOBU RITHARA.....2ND PROTESTOR/APPLICANT

AND

CATHERINE KATHURE MWAMBA.....1ST ADMINISTRATOR/RESPONDENT

CHARITY NGUGI MWAMBA.....2ND ADMINISTRATOR/RESPONDENT

GRACE KIENDE MWAMBA.....3RD ADMINISTRATOR/RESPONDENT

RULING

Introduction

1. **M'MWAMBA M'MUNYUA (Deceased)** died sometimes on 12th November, 1985. His estate comprises of **LR.NO. ABOTHUGUCHI/GITIE/183** measuring 1.3 Ha.

2. According to the chief's letter dated 25th November, 2005, the deceased's wife was deceased and he was survived by 4 children:

- 1) **Mark Marocho Mwamba** - Son
- 2) **Catherine Kathure Mwamba** - Daughter
- 3) **Charity Ngugi Mwamba** - Daughter
- 4) **Grace Kiende Mwamba** - Daughter

3. Letters of Administration were issued to **Mark Marocho Mwamba** on 21st February, 2011. Subsequently, a Certificate of Confirmation of Grant was issued on 21st September, 2011 distributing the estate as follows:

- i. **Stanley Gatobu Rithara (purchaser) - 1 acre**
- ii. **Mark Marocho Mwamba- Balance**

4. Mark Marocho Mwamba (*Administrator*) died on 31st October, 2013 and was substituted with Catherine Kathure Mwamba, Charity Ngugi Mwamba and Grace Kiende Mwamba as joint administrators by letters of administration dated 27th February, 2018.
5. By summons for confirmation dated 22nd August, 2019, the joint administrators sought orders that:

1) Letters of Administration issued on 06th November, 2018 be confirmed

2) Title to LR. NO. ABOTHUGUCHI/GITIE/183 be reverted to the name of M'MWAMBA M'MUNYUA (DECEASED)

Protestors'/Applicants' Case

6. SAVERA KATHURE (*1st Protestor/Applicant*) by her affidavit of protest sworn on 24th September, 2019 filed on even date asserted that she was wife to the late Mark Marocho Mwamba (*deceased's son*) with whom they were blessed with a child IREEN NKATHA and that her husband's share from deceased's estate ought to be distributed to her to hold in trust for the child. She denied that she had remarried.

7. STANLEY GATOBU RITHARA (*2nd Protestor/Applicant*) by his affidavit of protest sworn on 24th September, 2019 filed on even date asserted that he bought 1 acre of deceased's land from the late Mark Marocho Mwamba (*deceased's son*) for Kshs. 120,000/- to facilitate the filing of this cause. Annexed to the affidavit is a sale agreement dated 24th January, 2006 between him and Mark Marocho Mwamba (*deceased's son*) and two acknowledgement receipts for Kshs. 120,000/- and Kshs. 29,151.20 dated 30th January, 2006 and 13th February, 2006 respectively.

Administrators'/Respondents' Case

8. The 1st administrator by her affidavits sworn on 11th November, 2019 asserts that her signature and those of her co-Administrators appearing on the consent to mode of distribution dated 10th August, 2011 were forged. It is also submitted that the Administrators who are daughters of the deceased were not party to the sale agreement and further that the 1st Protestor/Applicant is not entitled to the estate for the reason that she left her matrimonial home and remarried after the death of husband.

Analysis and Determination

9. I have considered the affidavit evidence on record and submissions for the Administrators and the Protestors. The gravamen of this Protest revolves around distribution of **LR.NO. ABOTHUGUCHI/GITIE/183** and the issue for determination is who among the parties is entitled to benefit from the deceased's estate.

10. Concerning the Administrators, there is uncontroverted evidence that the deceased was survived by a son and three daughters. The son has since died and is survived by the 1st Protestor and a child IREEN NKATHA.

11. The Administrators who were daughters of the deceased, claim that they did not participate in the distribution of their father's estate, that their signatures were forged and finally that they did not consent to the disposal of part of the estate to the 2nd Respondent. Unfortunately, the matter is somehow complicated for the reason that the claims are made against their brother who is since deceased.

12. I have considered the consent that the Administrators deny signing and I find that a consent that purportedly disinherits beneficiaries of their legal entitlement cannot be taken lightly and this court is justified in concluding that the Administrators were discriminated against on the basis of their gender as daughters of the deceased.

13. In relation to the 1st Protestor, there is no dispute that she was married to the late Mark Marocho Mwamba (*deceased's son*) with whom they were blessed with a child IREEN NKATHA.

14. Section 35 of the Law of Succession Act provides that;

Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely;

and

(b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

15. The 1st Administrator's assertion that the 1st Protestor has remarried was not proved on a balance of probability or at all and I therefore find that she like IREEN NKATHA are entitled to benefit from the deceased's estate as wife and daughter of late Mark Marocho Mwamba (*deceased's son*).

16. With reference to the 2nd Protestor, the sale agreement and acknowledgment receipts he produced *prima facie* demonstrate that the late Mark Marocho Mwamba (*deceased's son*) received for Kshs. 149,151/- for sale of one acre of deceased's land.

17. Section 45 of the Law of Succession Act (*the Act*) provides as follows:

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

18. The primary function of a probate court is distribution of the estate of a dead person. (See *In Re Estate of G K K (Deceased) [2017] eKLR*):

19. Since the claim by the 2nd Protestor is that of a purchaser and is based on a sale of land agreement with the son of the deceased, the agreement was done after the death of the deceased and before confirmation of the grant herein. Such purchaser is not a beneficiary of the estate and should not be entertained in a succession cause. As such, his claim cannot be litigated in this succession cause. Given the circumstances of the case and the fact that the sale of the land violated Section 45 of *the Act*, this court cannot aid him in enforcing an unlawful transaction. For purposes of directing the interested parties, it suffices to cite Musyoka J

In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR that:

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

20. Applying the above legal test, the protest by the 2nd Protestor fails and is dismissed.

21. Section 38 of the *Act* 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 shall be equally divided among the surviving children (Emphasis added)

22. Consequently, I find that all the 4 children of the deceased are entitled to equality of inheritance of their father's estate and the proposal made by the 1st Administrator assigning a bigger share of the estate to herself is therefore rejected.

23. From the foregoing analysis, it is hereby ordered:

1) Any partition and resultant titles arising from LR.NO. ABOTHUGUCHI/GITIE/183 are cancelled and it is directed that the same be reverted to the name of M'MWAMBA M'MUNYUA (Deceased).

2) LR.NO. ABOTHUGUCHI/GITIE/183 is distributed as follows:

i. ¼ share to Catherine Kathure Mwamba

ii. ¼ share to Charity Ngugi Mwamba

iii. ¼ share to Grace Kiende Mwamba

iv. ¼ share for Mark Marocho Mwamba (deceased) to SAVERA KATHURE for life and upon determination of her life interest to

IREEN NKATHA

DATED AT MERU THIS 04th DAY OF March 2021

T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti
For Applicant - Mr. Muthomi for John Muthomi & Co. Advocates
1st Administrator - In person
2nd Administrator - In person
3rd Administrator - In person