



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 26 OF 2019

IN THE MATTER OF THE ESTATE OF TOMAS KAAI M'MWAJA (DECEASED)

AND

IN THE MATTER OF PROTEST

BETWEEN

CELINA NGOTO KAAI.....2nd ADMINISTRATOR/ 1ST PROTESTOR/APPLICANT

HARRIET MWAROMO.....2ND PROTESTOR/APPLICANT

DAMARIS GACERI.....3RD PROTESTOR/APPLICANT

FRIDAH KAREGI.....4TH PROTESTOR/APPLICANT

AND

WILSON MWITA.....1ST ADMINISTRATOR/RESPONDENT

JUDGMENT

Introduction

1. TOMAS KAAI M'MWAJA (*Deceased*) died sometimes on 04th March, 2005. His estate comprises of LR.NO. ABOTHUGUCHI/IGANE/1730.
2. On 06th March, 2018, Wilson Mwita and Celina Ngoto Kaai were appointed administrators of deceased's estate and Letters of Administration in respect thereof were issued on 12th March, 2018.

Summons

3. By Summons for Confirmation dated 16th July, 2019 and filed on 23rd July, 2019, Wilson Mwita, (*1st Administrator*) applied for confirmation and proposed that the estate be distributed as follows:

- 1) **Wilson Mwita - 0.6 acres**
- 2) **Jotham Mwirigi Kaai - 0.6 acres**
- 3) **Celina Ngoto Kaai - 0.25 acres**
- 4) **Harriet Mwaromo - 0.25 acres**
- 5) **Fridah Karegi - 0.25 acres**

6) **Damaris Gacheri - 0.25 acres**

7) **Jamlick Murangiri - 1 acre**

4. Subsequently on 20th July, 2020, Celina Ngoto

Kaai, (2nd Administrator) filed an affidavit of protest on grounds

THAT:

1) **The deceased was survived by Wilson Mwita, Celina Ngoto Kaai, Harriet Mwaromo, Fridah Karegi, Damaris Gacheri and Jotham Mwirigi Kaai**

2) **Jamlick Murangiri is a stranger to the estate**

3) **The mode of distribution proposed by the 1st Administrator is discriminatory and unconscionable**

4) **The estate ought to be distributed in equal shares**

5. In response to the Protest, the 1st Administrator filed a replying affidavit sworn on 06th August, 2020 and averred that he had with the consent of his brother Jotham Mwirigi Kaai sold 1 acre of the estate to Jamlick Murangiri and in support thereof annexed a sale agreement between him and Jamlick Murangiri. He contended that both him and his brother Joram Mwirigi Kaai were ready to forgo ½ acre each in favour of Jamlick Murangiri.

6. Jotham Mwirigi Kaai in his replying affidavit sworn on 06th August, 2020 and filed on 12th August, 2020 conceded that he was ready to forgo ½ acre in favour of Jamlick Murangiri.

Analysis and Determination

7. I have considered the affidavit evidence on record and submissions for the 1st Administrator and the 2nd Administrator/Protestor. The gravamen of this Protest revolves around distribution of LR.NO. ABOTHUGUCHI/IGANE/1730.

8. There is uncontroverted evidence from deceased's wife predeceased him and he was survived by 6 children as listed herein below:

1) **Wilson Mwita - Son**

2) **Celina Ngoto Kaai - Daughter**

3) **Harriet Mwaromo - Daughter**

4) **Fridah Karegi - Daughter**

5) **Damaris Gacheri - Daughter**

6) **Jotham Mwirigi Kaai - Son**

9. Section 38 of the Law of Succession Act (*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)

10. In this context, I am content to cite the proclamation by the Court of Appeal in the case of **Stephen Gitonga M'murithi vs. Faith Ngira Murithi [2015] eKLR** that:

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried”.

11. I am equally content to cite Article 27 of the Constitution which provides for equality and freedom from discrimination and consequently find that all the children of the deceased are entitled to equality of inheritance of their father's estate.

12. Section 45 of the Law of Succession Act (*the Act*) provides THAT:

(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.

13. There is no doubt that Wilson Mwita intermeddled with the estate by selling 1 acre of deceased's land to Jamlick Murangiri. Whereas the primary function of a probate court is distribution of the estate of a dead person and ought not to enforce the contract of sale between Wilson Mwita and Jamlick Murangiri, both Wilson Mwita and Jotham Mwirigi Kaai concede that they are willing to forgo ½ acre each of their share in favour of Jamlick Murangiri.

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

1) **LR.NO. ABOTHUGUCHI/IGANE/1730** is distributed in equal shares as follows:

i. **1/6 to Wilson Mwita**

ii. **1/6 to Jotham Mwirigi Kaai**

iii. **1/6 to Celina Ngoto Kaai**

iv. **1/6 to Harriet Mwaromo**

v. **1/6 to Fridah Karegi**

vi. **1/6 to Damaris Gacheri**

2) **Out of the shares for Wilson Mwita and Jotham Mwirigi Kaai , ½ acre from each share shall be apportioned to Jamlick Murangiri.**

3) **Each party shall bear its own costs**

DATED AT MERU THIS 04th DAY OF March 2021

T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For 1st Administrator - Ms. Mutegi for Njiru Kithaka & Co. Advocates

For Protestors - Mr. Gitonga for Basilio Gitonga, Muriithi & Co. Adv