



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 378 OF 2014

IN THE MATTER OF THE ESTATE OF MUNGIIRIA SILAS MURIITHI (DECEASED)

AND

IN THE MATTER OF PROTEST

BETWEEN

ROSE NTARARA MURIITHI.....1ST PROTESTOR/APPLICANT

TABITHA GACHERI.....2ND PROTESTOR/APPLICANT

AND

MARGARET MUKWANYAGA NABEA.....1ST PETITIONER/RESPONDENT

CHARLES GITUMA MURIITHI.....2ND PETITIONER/RESPONDENT

JUDGMENT

Introduction

1. MUNGIIRIA SILAS MURIITHI (*Deceased*) died sometimes on 03rd June,2011. It is pleaded that his estate comprises of the following assets:

- 1) LR.NO. KIIRUA/RUIRI/4177
- 2) LR.NO. NTIMA/IGOKI/6112
- 3) LR.NO. NTIMA/IGOKI/284

2. According to the chief's letter dated 14th June,2012 filed by the Petitioners on 15th August, 2012, the deceased was survived by the following dependents:

1st house

Margaret Mukwanyaga Nabea - Widow

Children

- 1) Audrey Gatwiri Muriithi
- 2) Clinton Kithinji Mungiiira

2nd house

Mary Nkirote Muthamia - Widow

Children

1) Kennedy Muriuki Mungiira

3. Letters of Administration were issued to **Margaret Mukwanyaga Nabea** and **Charles Gituma Murithi** on 03rd November, 2014 in their capacities as widow and brother of the deceased respectively.

4. Subsequently, the Petitioners/Respondents on 16th December, 2015 fled summons for confirmation and proposed that the deceased's estate be distributed wholly and jointly to Margaret Mukwanyaga Nabea, Audrey Gatwiri Muriithi and Clinton Kithinji Mungiira to the exclusion of Mary Nkirote Muthamia and her son Kennedy Muriuki Mungiira.

5. Subsequently, the Protestors on 24th October, 2017 filed an affidavit of protest in their capacities as sisters of the deceased and donees of a power of attorney by Mary Nkirote Muthamia to protect her interests and those of her son.

6. The Protestors acknowledge that the 1st Petitioner/Respondent was the deceased's 1st wife with whom they were blessed with two children. The proposed that deceased's estate be distributed to his two widows and 3 children as follows:

1) **LR.NO. KIIRUA/RUIRI/4177** measuring 0.40 Ha to Margaret Mukwanyaga Nabea, Audrey Gatwiri Muriithi and Clinton Kithinji Mungiira in equal shares given that it was deceased's desire that they be settled on the said land

2) **LR.NO. NTIMA/IGOKI/6112** measuring 0.611 Ha to Mary Nkirote Muthamia and Kennedy Muriuki Mungiira in equal shares for the reason that Mary Nkirote Muthamia had paid for an ongoing construction of a residential house on the said land.

3) **LR.NO. NTIMA/IGOKI/284** measuring 0.24 Ha to Mukwanyaga Nabea, Audrey Gatwiri Muriithi, Clinton Kithinji Mungiira, Mary Nkirote Muthamia and Kennedy Muriuki Mungiira in equal shares.

7. In a further affidavit filed on 18th December, 2017 and an affidavit in response to the protest filed on 12th September, 2018, by the 1st Petitioner/Respondent avers that she was married to the deceased under customary law and that there was no intention to disinherit Mary Nkirote Muthamia and her son Kennedy Muriuki Mungiira but that they were not available to participate in the cause. She further disputes the contention that it was Mary Nkirote Muthamia that paid for an ongoing construction of a residential house on **LR.NO. NTIMA/IGOKI/6112** and further alleges that the deceased had assets in America that have not been disclosed.

Analysis and Determination

8. I have considered the affidavit evidence on record and submissions for the Protestors/Applicants and by the Petitioners/Respondents.

9. I have deduced the following issues for determination:

1) Whether Protestors/Applicants have loci standi to represent Mary Nkirote Muthamia and Kennedy Muriuki Mungiira

2) What comprises the deceased's estate?

3) Who are the beneficiaries of the deceased?

4) How should the estate be distributed?

(a) Do Protestors/Applicants have loci standi to represent Mary Nkirote Muthamia and Kennedy Muriuki Mungiira

10. Protestors/Applicants filed the protest in their capacities as sisters of the deceased and donees of a power of attorney dated 31st May, 2012 by Mary Nkirote Muthamia to protect her interests and those of her son Kennedy Muriuki Mungiira

11. The 1st Petitioner respondent challenges the validity of the Power of Attorney on the ground that it has not been registered in Kenya.

12. Section of The Registration of Documents Act Chapter 285 Laws of Kenya provides that:

All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed.

13. A reading of the power of attorney dated 31st May, 2012 discloses that it does not confer or purport to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property and was therefore not registrable

14. Consequently, I find that the Protestors/Applicants have *loci standi* to represent Mary Nkirote Muthamia in this cause to protect her interests and those of her son Kennedy Muriuki Mungiira

(b) What comprises the deceased's estate?

15. Section 34 of the Law of Succession Act Cap 160 Laws of Kenya (*the Act*) A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.

16. The deceased died intestate and his free property that is subject of this cause as supported by extracts of title are two. i.e KIIRUA/RUIRI/4177 and LR.NO. NTIMA/IGOKI/6112

(c) Who are the beneficiaries of the deceased?

17. Beneficiaries are determined by their relationship to the deceased.

18. Whereas no evidence as tendered to prove the ingredients of a marriage under Ameru customary law between the deceased and the 1st Petitioner, the matter does not end there. The Protestors/Applicant acknowledge that the 1st Petitioner/Respondent was the deceased's 1st wife with whom they were blessed with two children Audrey Gatwiri Muriithi and Clinton Kithinji Mungiira. It was their evidence that the 1st Petitioner/Respondent and the deceased lived together as husband and wife between 1987 and 1992 when the deceased relocated to America where he died.

19. In such circumstances, this Court must endeavor to consider whether the prevailing circumstances of the case when taken into consideration can be a basis of presuming a marriage under the common law doctrine of presumption of marriage. In this position I take refuge in the Court of Appeal decision in Beth Nyandwa Kimani vs Joyce Nyakinywa Kimani & others (2006) eKLR where the Court held as follows: -

“For it matters not whether statutory or customary marriage requirements are strictly proved in marriage. The Court must go further and consider whether, on the facts and circumstances available on record, the principles of presumption of marriage was applicable in the appellant's favour. Such was the situation following the predecessor of this Court in Hortensiah Wanjiku Yaweh vs Public Trustee, Civil Appeal No. 13 of 1976 where Mustafa J.A in his leading judgment stated.....

20. The doctrine of presumption of marriage has its genesis in Section 119 of the Evidence Act, Cap. 80 of the Laws of Kenya which states that: -

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”.

21. The former Court of Appeal for Eastern Africa added its voice on the doctrine, in the case of Hortensiah Wanjiku Yawe -versus- The Public Trustee, Civil Appeal No. 13 of 1976 (*unreported*) and stated as follows: -

“The presumption does not depend on the law or a system of marriage. The presumption is simply is an assumption based on very long cohabitation and repute that the parties are husband and wife.”

22. More recently, the Court of Appeal in the case of Joseph Gitau Githongo -vs- Victoria Mwhaki (2014) eKLR stated as follows: -

“It (presumption of marriage) is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing that union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by cast away by the “husband”, or otherwise he dies, occurrence which do happen, the law subject to the requisite proof, bestows the status of “wife” upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased “husband”.

23. The Joseph Gitau Githongo case (above) is on all four with this case where the deceased married and cohabited with the 1st Petitioner/Respondent for years, begot two children with her, abandoned her and her children in Kenya and relocated to America and did not return home alive having died there.

24. For the reasons given above, I am persuaded that it would offend all notions of justice if this court was to cast away the 1st Petitioner/Respondent. From the facts of this case, I have come to the conclusion that the 1st Petitioner/Respondent is a wife of the deceased and hence a beneficiary of her deceased husband's estate.

25. Concerning Mary Nkirote Muthamia, there's evidence in the form of a marriage licence to demonstrate that she married the deceased on 13th August, 2009. She's therefore a wife and therefore a beneficiary of her deceased husband's estate.

26. The other beneficiaries who are not disputed are the deceased's children Audrey Gatwiri Muriithi, Clinton Kithinji Mungiira and Kennedy Muriuki Mungiira.

(d) How should the estate be distributed?

27. Section 40 of the Law of Succession Act (*the Act*) provides: -

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of 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 him as an additional unit to the number of children. (Emphasis added)

28. From the foregoing provisions of the law therefore, the deceased's estate ought to have been distributed in equal shares between the following:

- 1) Margaret Mukwanyaga Nabea - Surviving widow
- 2) Mary Nkirote Muthamia - Surviving widow
- 3) Audrey Gatwiri Muriithi - Child
- 4) Clinton Kithinji Mungiira - Child
- 5) Kennedy Muriuki Mungiira - Child

29. There is evidence that Mary Nkirote Muthamia has been paying for an ongoing construction of a residential house on **LR.NO. NTIMA/IGOKI/6112** a fact that this court has a duty to consider at the point of distribution.

30. Consequently, I find that the Protest has merit and it is therefore hereby ordered as follows:

1) The deceased's estate comprised in LR.NO. KIIRUA/RUIRI/4177 and LR.NO. NTIMA/IGOKI/6112 shall be distributed in equal shares to

Margaret Mukwanyaga Nabea - Surviving widow

Mary Nkirote Muthamia - Surviving widow

Audrey Gatwiri Muriithi - Child

Clinton Kithinji Mungiira - Child

Kennedy Muriuki Mungiira - Child

2) It is further directed that particular emphasis be taken to ensure that the shares for Mary Nkirote Muthamia and Kennedy Muriuki Mungiira share include ongoing construction of a residential house on LR.NO. NTIMA/IGOKI/6112

3) The administrators are hereby reminded that they have a duty to ensure that LR.NO. NTIMA/IGOKI/284 is collected and distributed to the deceased's beneficiaries

DATED AT MERU THIS 15TH DAY OF APRIL 2021

T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Applicants/Protestors - Ms. Mbogo for D.B.Osoro & Co Advocates

For Petitioners/Respondents - Ms. Musamba for Murango Mwenda & Co. Advs