



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO H.C. 75 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE SAMUEL JOSEPH MUNA GITARI (DECEASED)

CICILIA WANGECHI MUNA.....PETITIONER

VERSUS

JECINTA THOGORI MUNA.....RESPONDENT

JUDGEMENT

BACKGROUND

1. The deceased herein **Samuel Joseph Muna Gitara** died on 7th April 2013. He left behind a wife **Cicilia Wangechi Muna** who is the petitioner herein, a daughter **Jecinta Thogori Muna**, the protestor herein and son who is deceased but left behind a wife **Jennifer Wakarindi** and children. This matter was filed by way of citation on 5th February 2014 seeking that the **Jacinta Thogori Muna** be compelled by the court to sign a consent for the petitioner to petition for letters of administration.
2. The objector **Jecinta Thogori Muna** opposed the application by filing an affidavit on 2nd March, 2014 on the ground that the Petitioner was intermeddling with the estate of the deceased having sold some of the property without rendering a full account to other beneficiaries.
3. The citation was heard and the court determined that the Petitioner would singularly file for a grant of letters of administration.
4. The petitioner **Cicilia Wangechi Muna** petitioned for a grant of letters of administration intestate on the 18th day of December 2015. In her petition, the Petitioner avers that the deceased died intestate and was survived by herself, Jacinta Thogori and her late sons wife. She identifies both of them as beneficiaries entitled to the share of the estate of the deceased. A grant of letters of administration intestate was issued to **Cicilia Wangechi Muna** on the 18th of April 2017.
5. On 26th September 2018, **Cicilia Wangechi Muna** the administratrix herein filed summons for the confirmation of the grant of letters of administration intestate made to her on the 18th day of April 2017 be confirmed. In the affidavit in support of the summons she avers that the deceased died on 7th April 2013, she further avers that the beneficiaries of the deceased are amiable to the mode of distribution set out in the consent for distribution. Which sets out the mode of distribution as follows:

List of properties

Who to inherit

- | | |
|---|-------------------------------------|
| i. Mau summit/Molo block7/42 (Tayari) | George Kori & Susan Wangechi |
| ii. Mau summit/Molo block1/33(Mutirithia) | Jacinta Thogori Muna |
| | Sammy Muna Gitari in equal shares. |
| iii. Mau summit block1/258(Mutirithia) | Cicilia Wangechi Muna whole share |
| iv. Mau summit/block1/341 (Mutirithia) | Jacinta Thogori Kimotho whole share |
| v. Mau summit/ block 1/604(Mutirithia) | Casino Jacinta Thogori whole share |

vi. Mau summit/Molo block1/896 (Mutirithia)	Jennifer Waarindi (To hold in trust for her children)
vii. Money in Account No. xxxx Faulu Kenya	Cicilia Wangechi Muna
viii. Money in Account No. xxxx	Cicilia Wangechi Muna
ix. Money in Account Kmolb xxxx	Cicilia Wangechi Muna
x. Money in account kmolppa- xxxx	Cicilia Wangechi Muna
xi. Standard Bank shares	Cicilia Wangechi Muna
xii. Safaricom Ltd shares	Cicilia Wangechi Muna
xiii. Electricity Genrations co.ltd	Cicilia Wangechi Muna
xiv. Kengen Ltd Certificate No. xxxx	Cicilia Wangechi Muna

PROTESTOR'S CASE

6. The petitioner's daughter **Jacinta Thogori Muna** filed affidavit of protest on the 11th day of October 2018 in opposition to the petitioners mode of distribution. She denied knowledge of the proposed beneficiaries **George Kori** and **Susan Wangechi** of Mau Summit /Block 7/42 (Tayari), and proposed that the said parcel be divided in equal shares between herself and **Jennifer Wakarindi** (to hold in trust for her children).

7. The protestor further averred that the deceased had already distributed Mau Summit/Molo Block 1/33 (Mutirithia) before his demise and she had been allocated 2 ½ acres where **Jennifer Wakarindi** was given 3 acres and she proposed that the same remains the same as per the wishes of the deceased.

8. She proposed that the Parcel known as Mau Summit/ Block 1/258 which is a matrimonial property comprising of 3 bedroom house, 6 rental shops, and 40 single rental units be divided equally between herself and Cicilia Wangechi Muna.

9. Lastly, the protestor proposed that the 4 shares of Molo Diary Co-operative be distributed equally between herself and Jennifer Wakarindi. She averred that the proposed mode of distribution by the petitioner was unjust and unfair.

10. The court gave directions that this matter do provide by way of *viva voce* evidence.

11. At the hearing the protestor confirmed that she is the daughter of the deceased and the Petitioner is her mother. She further confirmed that her parents had 2 children her and her late brother who was married to **Jennifer Wakarindi** and were blessed with 4 children. She testified that she was not married but has a son. She further stated that she lives with her mother in plot No. Mau Summit block 1/258 and the same is not divided. She stated that the deceased gave her 2 shops before his demise and that she is also renting out 2 other single rooms and said the rooms were built by her son.

12. On Cross Examination by **Ms. Nancy Njoroge** for the petitioner, she confirms that she is a businesswoman and she has been living with her parents and her parents educated her son up to the university level. She said she related well with her parents save for her son who had difficulties with the deceased; she confirmed seeing an affidavit that was attached to the will of her deceased father. She proposed that money in the accounts to be divided between the 3 beneficiaries herself, her mother and **Jennifer Wakarindi**.

PETITIONERS EVIDENCE

13. The Petitioner confirmed that she was blessed with 2 children; the protestor and her deceased son who was married to Jeniffer Wakarindi. She proposed distribution of the deceased's estate as per her schedule of distribution. In support of her claim, she produced a Will by the deceased stating that it captures the wishes of the deceased. She said she is not collecting any rent from the estate of the deceased as the same is being collected by the Protestor and her son. She confirms that the protestor's son contributed to construction in plot 258 by availing one tractor of building stones.

14. On cross-exam by **Ngure**, counsel for the protestor she stated that her husband was not sick when he prepared the Will distributing the property. And that she saw the will after the death of her husband from his advocate. On re examination, the protestor stated that she obtained the Will after the death of his husband and that his husband had distributed the property according to his wishes.

15. The petitioner availed one witness DW2 who said the deceased was his stepbrother and that on 12th May, 2012, the deceased called him to go to his home together with an old man by the name **Kimani**, where they witnessed the deceased write a Will in the Kikuyu language and they both affixed their signatures on the Will. He stated that during the writing of the Will, the deceased health was okay. On cross-examination, DW2 confirmed that they did not affix their ID numbers to the Will but only wrote their names, and said that during that time, they were only 3 people present.

16. The petitioner **Cicila Wangechi** filed a further affidavit in response to the protest where she averred that, the protestor lied on oath as

she is well aware that parcel no. Mau Summit Molo Block 7/42 Tayari was sold to **George Kinoti** and **Simon Kariuki** making it unavailable for distribution. She further averred that Mau Summit/ Block 1/33 was already distributed before the demise of the deceased and should stay as such.

17. She further averred that Mau Summit/Molo Block 1/258 is her matrimonial home where she lived with the deceased and she built rental houses and it was the deceased wishes that after their demise, the same goes to her son from her late son **Sammy Muna Gitara**.

18. The petitioner averred that the protestor has forcefully taken Mau Summit Molo block 1/341 (Mutirithia) which comprises 14 rental rooms where the protestor and his son collect rent against the deceased's wishes.

19. The petitioner's advocate filed written submissions while the protestor's advocate opted to rely of evidence on record.

PETITIONER'S SUBMISSIONS

20. The petitioner submitted that she filed petition in respect to the deceased's estate and was issued with the grant of letters of administration and has proceeded to distribute the estate of the deceased as per the deceased wishes. The petitioner proposed that Mau/summit Molo Block 1/258 (Mutirithia) and Maziwa shares to be inherited by Muna son of the deceased Gitari. Parcel No. Mau Summit/ Molo block 1/33 (Mutirithia) was shared between the protestor who was allotted 2 ½ acres while Muna's son of Gitara and his siblings were allotted 3 acres.

21. Counsel further submitted that plot No. Mau summit Molo Block1/258 that was allocated to the petitioner by the deceased where she used to collect rent but was forcefully taken by the protestor who now illegally collects the rent. She submitted that this plot is the bone of contention as the protestor claims a share of the same saying that his son contributed to building of 2 rental houses in the said plot and thus she is entitled to collect rent. The Petitioner further submits that the deceased through his Will intended that Mau summit block 1/258 where his homestead was going to go his grandson who is named after him.

22. She submitted that plot number Mau Summit Block 1/896 (Mutirithia) was allocated to **Jeniffer Wakarindi** to hold in trust for her children, and they have been living in that parcel of land. while Mau Summit Block 7/42 (Tayari) had been sold by the deceased before his demise.

23. Further that the petitioner submits that the protestor agrees with the deceased wishes on the mode of distribution save for the Mau Summit Block 1/258.

24. In conclusion counsel submitted that the petitioner prays that she be allowed to keep the monies in the deceased accounts as well as the shares held by Standard Bank, Safaricom, Electricity Generations Co. Ltd and Ken Gen as she is elderly and ailing and needs the money for medical attention; and further that the protestor has not provided any evidence as proof of the loan facility that she is sufficing to allow her to collect the rent from the various rental houses against the wishes of the deceased and prays that the deceased wishes are fulfilled as per the Will and urged this court to order the protestor to leave the homestead and settle in her parcel of land was allocated to her by the father.

ANALYSIS AND DETERMINATION

25. I have considered parties averments evidence adduced and submissions filed and find the following as issues for determination:-

- a) Whether the Will is valid/whether the deceased died intestate
- b) What is the fair mode of distribution of the estate of the deceased?

(i) Whether the will is valid/whether the deceased died intestate

26. The validity of a will is dependant on 2 factors, the capacity of the testator and compliance with the formal requirements. **Section 5 of the law of Succession Act** deals with the capacity to make a Will. It provides as follows: -

“5(1). ... any person who is sound of mind and not a minor may dispose of his free property by will ...

(2) ...

(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

(4). The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.”

27. In the instant case, the protestor did not raise any issue on testamentary capacity. In her averments the protestor did not state neither did she deny the fact that the Advocate who had custody of the Will was her fathers Advocate. The petitioner indicate that she learnt of the will after the death of the deceased,there is therefore no evidence to show that she influence the drafting of the will.she also agrees with with the mode of distribution in the will save for Plot No. Mau Summit Molo Block 1/258 which she also wants to inherit.

28. On the formal requirements of validity of a Will, the law is in **Section 11 of the Law of Succession Act**. It states; no written Will shall be valid unless:-

“(a) The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

29. The Will show that it was witnessed by 2 persons; one who is still alive was availed in court to testify. He confirmed that they witnessed the deceased sign the Will and they also signed the Will; no issue of authenticity of the signature was raised; in my view the Will meet the legal requirement of making a Will.

30. The testator having complied with the requirements of a valid, all beneficiaries that are entitled to inherit the estate of the deceased have been adequately provided for. In my view the court should not interfere with the wishes of a deceased person unless the requirements for making a Will have not been met and not all the beneficiaries have been provided for without valid reason or the distribution is manifestly unfair to some of the beneficiaries.

(ii)What is the fair mode of distribution of the estate of the deceased?

31. This court will be guided by **Section 35 of the Law of Succession Act** which provide as follows:-

“35. 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.

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

32. The above legal provision ensures that parties are accorded equal distribution of the estate of the deceased amongst the deceased children. The petitioner’s argument is that her proposed mode of distribution is as per the deceaseds wish. On the other hand, the protestor’s argument is that the distribution is not fair. She also argues that her son made contribution in development of plot 258. She agrees with petitioner in respect to other properties save for plot no 258 and money in the deceased’s account and proceeds from shares. And in view of the fact that parties herein are not in agreement on the mode of distribution the court will consider whether the mode of distribution is fair and just.

33. In respect to money in the account and shares owned by the deceased,it would be fare as proposed by the petitioner to allow her utilize the funds and proceeds from shares for her upkeep and medication. The shares and money that will survive the petitioner to be shared equally between the protestor and the son of her deceased brother **Samuel Muna Gitira** who will hold in trust for her himself and her siblings.

34. **FINAL ORDERS**

1) Property Mau Summit Block1/258 (Mutirithia) where the petitioner’s matrimonial home is to be held jointly by the petitioner and the son of Samuel Muna Gitira to hold in trust for the children of the deceased’s son the late Samuel Muna Gitira

2) Shares from and money in the account to go to the petitioner during her life time. The same to be shared equally between the protestor and he brothers children.

3) Jennifer Warindi to have 3 acres from Mau Summit/Molo Block1/33 (Mutirithia) to hold in trust for her childerm

4) Each party to bear own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 10TH DAY OF JUNE, 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Lepikas - Court Assistant

Ms. Njoroge Counsel for Petitioner

Mr. Ngure Counsel for objectors present for administrators