



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**MISC.SUCCESSION CAUSE 52 OF 2018**

**IN THE MATTER OF THE ESTATE OF MURUNGI RUTERE (DECEASED)**

**EUSTACE MUTEGI MURUNGI.....1<sup>ST</sup> APPLICANT**

**VERSUS**

**AGRIVINE KABURI NJOKA.....RESPONDENT**

**RULING**

This matter relates to the estate of **Murungi Rutere** (Deceased) who died intestate on 16/5/1992. A grant of letters of administration in his estate was issued **Agrivine Kaburi Njoka** on 7/9/2017 in the Chief Magistrate's Court at **Chuka in Succession Cause No.50/2016**. The grant was later confirmed on 11/10/2017. The estate of the deceased which was comprised in Land Parcel No.Karingani/Weru/461 and Karingani/Muiru/145were vested with the Petitioner Agrivine Kaburi Njoka.

1. A summons for the revocation of the said grant was filed by Eustace Mutegi based on the ground that the grant was obtained fraudulently by concealing material facts, failure to disclose that the deceased had other children who were living on the parcels of land forming the estate of the deceased. The summons proceeded to hearing and **Justice R. Limo** gave Judgment in the matter on 24/6/2020, wherein he held that the Respondent in the right person under Section 66 of the Law of Succession Act to be appointed the administrator of the estate of the deceased and proceeded to appoint her as the administratrix. It was further directed that the administratrix was at liberty to move the court for confirmation of the grant before the expiry of the statutory period.

2. The administratrix proceeded and filed a summons for confirmation dated 30/7/2020. In her supporting affidavit sworn on 30/7/2020 she depones that the deceased was survived by Agrivine Kaburi Njoka who is the daughter. He went on to propose that the estate of the deceased be distributed as follows:-

**L.R Karingani/Weru/461**- Agrivine Kaburi Njoka- whole share.

**L.R. No. Karingani/Muiru/145**- Agrivine Kaburi Njoka- whole shares.

3. This prompted a protest from Eustace Mutegi Murungi who filed an affidavit of protest sworn on 4/11/2020. The contention by the protestor is that he is a son of the deceased herein Murungi Rutere. That the administratrix had filed a **Succession Cause No. 50/2016** and she was issued with a grant which was later confirmed. That she had distributed the estate of the deceased to herself in total exclusion of himself and other children of the deceased. That he successfully moved the court to revoke the said grant which was revoked vide a Judgment dated 24/6/2020. The applicant was issued with a fresh grant which she is seeking to have confirmed.

4. The respondent depones that the applicant is seeking to have the grant confirmed and the estate be distributed to her to the exclusion of other beneficiaries. The protestor has filed the protest on his own behalf and on behalf of other beneficiaries. He depones that the deceased was survived by the following:-

(i) Agrivine Kaburi Njoka

(ii) Eustace Mutegi Murungi

(iii) Delvina Cianjege

(iv) Justa Ciambuba

(v) Agostin Thieri Muthaa

- (vi) Beford Ndeke
- (vii) Rose Kaari
- (viii) Jamleck Nyamu
- (ix) David Ngai
- (x) Franklin Murithi

The protestor avers that it is only fair that the estate be distributed equally to all the children of the deceased. He proposes the distribution of the estate to be as follows:-

**(A) LAND PARCEL NO. KARINGANI/MUIRU/145 (2 ACRES)**

- Eustace Mutgeti Murungi - whole

**LAND PARCEL NO. KARINGANI/WERU/461 (22 ACRES)**

- (i) Agrivine Kaburi Njoka - 2 Acres
- (ii) Delfina Cianjege - 2 Acres
- (iii) Justa Ciambuba Nyamu - 2 Acres
- (iv) Albert Kathia - 2 Acres
- (v) Bedford Ndeke Muthaa - 2 Acres
- (vi) Rose Kaari Muthaa - 2 Acres
- (vii) Harriet Ciambaka Nkune - 2 Acres
- (viii) David Muthaa - 2 Acres
- (ix) Franklin Murithi Muthaa - 2 Acres
- (x) Jamlick Nyamu Muthaa - 2 Acres
- (xi) Jenesia Kaari Kaburia - 2 Acres

That Agostin Theuri Muthaa had been allocated Land Parcel No. Karingani/Mugirirwa/392 and he was therefore excluded from the proposed mode of distribution. The summons was disposed off by way of written submissions.

5. For the applicant it is submitted that the estate which is 24 acres should be distributed equally to all the beneficiaries as provided under **Section 38 of the Law of Succession Act**. The Section provides:

***“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.”***

The protestor submits that the deceased is survived by the Agrivine Kaburi Njoka who is his biological child and several children, who are dependants. He proposes that the estate be distributed equally amongst the administratrix and other dependants. The protestor relies on the case of **David Ngahu Gakuu & Another -v- Hilda Wangai Murihti & Another (2020) eKLR and Tunzia Ndavola Atundi-v- Festus Fundi (2015) eKLR**.

6. For the respondent, it is submitted that the deceased was married to one wife with whom they had three children, two who are deceased and one surviving who is the respondent in this case. That this court in the Judgment of 24/6/2020 held that the deceased had other dependants. It is the respondent submissions that the issue for determination is the distribution of the estate. She relies on the case of **Vijaykumar Dharamshi Ahanani (deceased) 2017 eKLR** where the court held that.

***“ In cases of dependency the court only provides reasonable provision for the party if proved she was a dependent but the same is not necessarily entitled to an equal share of the deceased’s estate as the rest of the beneficiaries of the deceased.”***

He also relies on **Section 26 and 28 of the Law of Succession Act**. The respondent refers the court to her affidavit sworn on 21/12/2020 at paragraph 16 and avers that the protestor and his siblings are all people of immense means and they live on their different parcels of land.

That they are only determined to unsettle her. The respondent urges the court to find that being the only surviving child of the deceased she is entitled to get the entire estate of the deceased. That the applicant has not shown the extent of his dependency in the estate of the deceased, on his part or even on the part of those on whose behalf he has filed the protest.

7. I have considered the proceedings herein including the Judgment of my brother **Justice Limo**. I have also considered the summons for confirmation of grant, the protest and the submissions. The issue which arises for determination is the distribution of the estate of the deceased.

**Analysis and determination:**

This court had given Judgment in a summons for revocation of grant. The court had considered the evidence which was tendered by the parties in arriving at that Judgment. None of the parties seem to have appealed. In view of the matter before me, I will as much as possible rely on finding by Justice Limo to reach a fair determination in this matter.

8. The issue as to whether the deceased had other dependants/children was considered by Justice Limo. He held that the deceased took the children and the wives of his brother when his brother Muthaa Nkune died. The Judge stated at paragraph 35 of the Judgment.

***“..... This was clearly apparent in the present case notwithstanding the fact that the applicant did not establish the extent of parental responsibility or how much the deceased in this cause provided for his brother’s children. I am persuaded based on evidence presented before me that it is more likely than not that he catered for them fully at least immediately prior to his death.”***

The original grant was revoked on the basis that the respondent had concealed material facts that there were other dependants. I will not revisit the issue in this ruling. The respondent is a child of the deceased and therefore a dependant without prove of dependency. **Section 29(a)** which defines meaning of dependant provides that-

***“ For the purpose of this part, dependant means-***

***“ (a) the wife or wives or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.”***

***The respondent is therefore entitled to the estate of the deceased as of right. Section 66 of the Act provides for the order of preference to be given to certain persons to administer where the deceased died intestate. These includes spouses and other beneficiaries entitled on intestacy according to their respective beneficial interest. In this case the claim by the respondents ranks first on priority.***

Despite that, the Act recognizes other beneficiaries who may be entitled to the estate by virtue of having been maintained by the deceased prior to his death.

**Section 29 (b) of the Act** provides;

***“Such of the deceased parents, step parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family his own, brothers and sisters, and half-brothers and half-sisters as were being maintained by the deceased immediately prior to his death,”***

It is therefore clear that persons who prove dependency are supposed to be considered when distributing the net intestate estate. However, it is my view that they are not entitled to get equal shares with the biological children of the deceased. It is upon the court to exercise discretion and make provision for them. I say so because **Section 26 of the Act** provides:-

***“ Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”***

The Act emphasis at **Section 27** that the court shall have complete discretion to order what is to be given to the dependant. It is not mandatory that the other dependants get an equal share with children of the deceased as suggested by the protestor. See **Vijay Kumar Dharamshi Dhanani (deceased) Supra.**

Furthermore the Act gives circumstances which the court has to consider when making such provisions.

**Section 28 of the Act** provides-

***“ In considering whether any order should be made under this Part, and if so what order, the court shall have regard to-***

***(a) the nature and amount of the deceased’s property;***

*(b) any past, present or future capital or income from any source of the dependant;*

*(c) the existing and future means and needs of the dependant;*

*(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;*

*(e) the conduct of the dependant in relation to the deceased;*

*(f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;*  
*(g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant."*

I am persuaded by the submissions by the Counsel for the respondent that the court in exercising the discretion should be guided by the nature and the amount of the deceased's property as well as the past, present or future capital or income of any source of the dependant, the existing and future means and needs of dependant. The estate of the deceased comprised of two parcels of land as stated above, that is Karingani/Muiru/145 measuring 2 Acres.

Karingani/Weru/461 measuring 10.2 Ha

9. The respondent submitted that the applicant and his siblings are people of immense wealth who own different parcels of land. The averment was not challenged and I take it that it is the true position. It shows that the dependants are not destitute and they own parcels of land where they are settled. **Justice Limo** in his Judgment stated that;

*" ..... It is a common practice among African Communities that a surviving brother would normally take over responsibility of a deceased's brother's family and provide for them. This was clearly apparent in the present case notwithstanding that the applicant did not establish the extent of parental responsibility or how much the deceased in this cause provided for the brother's children..."*

The Judge was clearly stating that the applicant did not prove the extent of his dependency and in particular, whether the dependency entitles him and his siblings to a share of the net intestate estate. There is a condition precedent to which a person claiming dependency has to establish **Section 29(b)** of the Act requires that a person claiming dependency must prove that he/she was being maintained by the deceased prior to his death. Other than being taken by the deceased, material evidence is lacking on how they were being maintained **Section 107 of the Evidence Act** provides that;

*" Whoever desires any court to give Judgment as to any legal right or liability dependant on the exercise of facts which he asserts must prove that those facts exists."*

It is my view and it is clearly the view taken by Justice Limo that the protestor and his siblings had the burden to prove the extent upon which the deceased maintained them prior to his death. In the case of **Vjay Kumar Dharamshi Dhanani (Deceased) Supra** the Court of Appeal stated that for the court to make provision for a dependant, he or she has to prove dependency. The applicants, Bedford Ndeke and Delvina Cianjege Njega have deponed that the deceased Murungi Rutere is their father. These affidavits are not true as they are not biological children of the deceased. The affidavits are therefore false cannot be relied by this court to hold that they have proved dependency. I take it that the applicant and his siblings did not prove dependency and that is why the respondent was given the greenlight to file summons for confirmation of grant. It can be safely concluded that after considering the evidence, **Justice Limo** did not find any merits in the claim by the respondents. Had he found that they had a valid claim for dependency, nothing would have stopped him from distributing the estate.

On my part, I find that the applicants have failed to prove that they are dependants who are entitled to a share of the estate of the deceased. They are now adults who are of age and some are professionals settled, living independent lives on their respective parcels of land. From what is submitted by the respondent, they are only dependants on paper as they are all settled and thriving. I find that the applicants have failed to prove the extent of dependency on the estate of the deceased which is a condition precedent for this court to make provision for them.

**In conclusion:**

I find that the respondent is the only rightful beneficiary with priority to the estate of the deceased. This court has discretion to make reasonable provision for the applicants. Discretion must always be exercised fairly and judicially. It would not be fair to make provision for the applicants when it has been demonstrated that they are well settled elsewhere and deny the respondent her inheritance. I find that the respondent being the only surviving child of the deceased is entitled to the estate. I find that the protest is without merits and is dismissed. The summons for confirmation of grant is allowed as prayed. The grant is confirmed and distribution be as deponed at paragraph 6 of the affidavit of the applicant.

Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 22ND DAY OF JULY 2021.**

**L.W. GITARI**

**JUDGE**

22/7/2021

**RULING HAS BEEN READ OUT IN OPEN COURT.**

**L.W. GITARI**

**JUDGE**

22/7/2021