



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

SUCCESSION CAUSE NO. 23 OF 2018

(Formerly Meru High Court Succession No. 220 of 1991)

IN THE MATTER OF THE ESTATE OF JOEL M'THARA RURIA (DECEASED)

DANSTAN MUTEMBEI.....PETITIONER/APPLICANT

VERSUS

JOYCE MUTHONI.....1ST PROTESTOR

FAITH KAGUTHI.....2ND PROTESTOR

BETH IGOJI.....3RD PROTESTOR

J U D G M E N T

Introduction

1. The late Joel M'Thara Ruria (hereinafter referred to as the ("deceased")) died intestate on 05/10/1969. On 14/10/2019, Danstan Mutembei (Petitioner/Applicant) and Joyce Muthoni (1stProtestor) were appointed as joint administrator and administratrix respectively of the subject estate. In view of the age of the matter, the court gave the two liberty to jointly or individually apply for confirmation of the grant before the expiry of the statutory period.
2. The Administrator/Applicant filed summons for confirmation of grant dated 17/12/2019 containing his proposal on the mode of distribution of the subject estate.
3. Dissatisfied with the proposed mode of distribution, the protestors filed an affidavit of protest sworn on 15/10/2020 and the court directed that the protest be canvassed by way of written submissions.

Protestors' Submissions

4. The Protestors' written submissions were filed on 04/12/2020. According to the Protestors, the true and legal beneficiaries of the estate of the deceased as per section 29A of the Law of Succession Act are as follows:

- i. Florence Kathuni – Wife (deceased)
- ii. Evangeline Mukwanyaga – Daughter (deceased)
- iii. Edward Mbaya – Son
- iv. Geoffrey Miriti – Son (deceased) but left Bridget Ukima (wife), Mwandiki Miriti, Wanja Miriti and Muthoni Miriti.
- v. Jeremy Kaburu – Son (deceased) but left behind Rose Mukwagitari (wife), Makena Kaburu, Njagi Kaburu, Mawira Kaburu, Kageni Kaburu, Mukwanyaga Kaburu and Bundi Kaburu.
- vi. Danstan Mutembei – Son (Petitioner)

- vii. Joyce Muthoni – Daughter
- viii. Faith Kaguthi – Daughter
- ix. Lucy Gatakaa – Daughter
- x. Hellen Mugure – Daughter (deceased)
- xi. Beth Igoji – Daughter

5. The mode of distribution of the subject estate as proposed by the protestors is as follows:

- i. Danstan Mutembei – 1.65 Acres
- ii. Rosemary Mukwagitari – 1.65 Acres to hold in trust for her benefit and that of her children:
 - a. Makena Kaburu
 - b. Njagi Kaburu
 - c. Mawira Kaburu
 - d. Mukwanyaga Kaburu
 - e. Bundi Kaburu
- iii. Joyce Muthoni – 1.65 Acres
- iv. Faith Kaguthi – 1.65 Acres
- v. Lucy Gatakaa – 1.65 Acres
- vi. Beth Igoji – 1.65 Acres

Petitioner's Submissions

6. The Petitioner's written submissions were filed on 23/12/2020. The Petitioner maintains that land parcel L.R. Mwimbi/Chogoria/ 116 is part of the subject estate and that the allegation that Edward Mbaya and Geoffrey Miriti benefited intervals is unfounded.

7. The Petitioner's/Applicant's mode of distribution is as follows:

- i. L. R. Mwimbi/Chogoria/199 (9.9 Acres in total)
 - a. Danstan Mutembei Joel – 1.298 Ha
 - b. Rosemary Mukwagitari Kaburu – 1.298 Ha
 - c. Joyce Muthoni Joel – 0.202 Ha
 - d. Lucy Gataka – 0.202 Ha
- ii. L. R. Mwimbi/Chogoria/116
 - a. Edward Mbaya – 1.298 Ha
 - b. Bridget Ukima – 1.298 Ha
 - c. Faith Kaguthi – 0.202 Ha
 - d. Beth Igoji – 0.202 Ha

8. It is the Petitioner's submission that the proposed mode of distribution is as per the verbal will of the deceased and is based on Meru Customary Law which places importance on equitable rather as opposed to equal distribution/division of property.

9. According to the Petitioner, the provisions of the Law of Succession Act (Cap 160 of the Laws of Kenya) and the Constitution of Kenya 2010 with regards to equal division/distribution of the property do not apply in this case because the deceased died in 1969 before they had not been enacted.

10. Paragraph 4 of the Petitioner's written submissions read as follows:

“The other reason for the petitioner's mode of distribution is that the daughters to the deceased are married elsewhere and they are not in any way destitute as they may want the court to believe. They have property where they are married. The only reason they want a piece of land from themselves is only to enrich themselves.”

11. The Petitioner submits that the said mode of distribution is supported by:

- i. Rosemary Mukwagitari (daughter-in-law of the deceased); and
- ii. Lucy Gatakaa (daughter of the deceased)

12. The Petitioner relied on the following cases to buttress his submissions:

- i. Philis Michere Mucembi vs. Wamai Muchembi Civil Appeal No. 61 of 2006 Embu
- ii. HCC Succession Cause No. 2487 of 1997 Nairobi, Estate of Kiiru Muhia 'A' deceased
- iii. HCC Succession Cause No. 2310 of 2004, Estate of Duati Mbuthia, deceased
- iv. HCC Succession Cause No. 122 of 2010 Estate of Nyamu Muga – Deceased
- v. HCC Succession no. 715 of 2015 Estate of Macharia Njuguna – dcd Michael Maina & Anor v. Stanley Muiru Njuguna

Issues for determination:- Arising from evidence in the affidavit and the submissions, the issues are:-

- (i) Who are the beneficiaries and/or dependants entitled to the estate of the deceased.
- (ii) Whether L.R. Mwimbi/Chogoria/116 forms part of the estate of the deceased.
- (iii) Whether the law applicable for the mode of distribution is Meru customary law or section 40 of the Law of Succession Act.

Analysis and Determination

a. Who are the beneficiaries and/or dependants of the deceased?

13. **Section 29 of the Law of Succession Act** gives the definition 'dependant' to include the wife and children of the deceased. The deceased had one wife (the late Florence Kathuni) and was blessed with ten children (four sons and six daughters) as follows:

- i. Evangeline Mukwanyaga (deceased) – Daughter
- ii. Edward Mbaya – Son
- iii. Geoffrey Miriti (deceased) – Son
- iv. Jeremy Kaburu (deceased) – Son
- v. Danstan Mutembei – Son
- vi. Joyce Muthoni – Daughter
- vii. Faith Kaguthi – Daughter
- viii. Lucy Gatakaa – Daughter
- ix. Hellen Mugure (deceased) – Daughter
- x. Beth Igoji – Daughter

14. The late Geoffrey Miriti left Bridget Ukima (wife), Mwandiki Miriti, Wanja Miriti and Muthoni Miriti.

15. The late Jeremy Kaburu left behind Rose Mukwagitari (wife), Makena Kaburu, Njagi Kaburu, Mawira Kaburu, Kageni Kaburu, Mukwanyaga Kaburu and Bundi Kaburu.

16. The protestors contend that the deceased bequeathed properties known as L.R. Mwimbi/Chogoria/1000 and L.R. Mwimbi/Chogoria/116 to Geoffrey Miriti and Edward Mbaya respectively prior to his demise. The protestors allege that Geoffrey Miriti and Edward Mbaya benefited *inter vivos* and are therefore not entitled to a share of the deceased's estate under this cause.

17. It is the protestors' submission that the rest of the deceased's estate ought to be distributed equally among the other beneficiaries. Consequently, the protestors aver that the lawful beneficiaries entitled to share the estate of the deceased are 6 in number namely:

- i. Danstan Mutembei
- ii. Rosemary Mukwagitari - to hold in trust for her benefit and that of her children:
 - a. Makena Kaburu
 - b. Njagi Kaburu
 - c. Mawira Kaburu
 - d. Mukwanyaga Kaburu
 - e. Bundi Kaburu (to represent the estate of the late Jeremy Kaburu)
- iii. Joyce Muthoni
- iv. Faith Kaguthi
- v. Lucy Gatakaa
- vi. Beth Igoji

There is no dispute between the petitioner and the protestors that the deceased is survived by his children who are listed above and two of the sons who are deceased are survived by their wives and children. They are the rightful beneficiaries and dependants of the deceased.

b. Which properties comprise the estate of the deceased?

18. Section 3 of the Law of Succession Act defines 'estate' to mean "*the free property of a deceased person.*"

19. It is not disputed that the property known as **L. R. Mwimbi/Chogoria /199** comprised part of the estate of the deceased. It is however contested whether the property known as **L.R. Mwimbi/Chogoria/116** formed part of the deceased's estate. The Petitioner alleges that **L.R. Mwimbi/Chogoria/116** forms part of the deceased estate while the Protestors allege that the said contested parcel of land is registered under Edward Mbaya and does not form part of the deceased's estate.

20. Two children of the deceased namely Geoffrey Miriti and Edward Mbaya were gifted *inter vivos* hence the invocation of Section 28(d) and Section 42 of the Law of Succession Act. The two were allegedly gifted *inter vivos* as follows:

- i. Geoffrey Miriti – L.R. Mwimbi/Chogoria/1000
- ii. Edward Mbaya – L.R. Mwimbi/Chogoria/116

21. The protestors allege that the two Geoffrey Miriti and Edward Mbaya are not entitled to any share under this succession cause and they are not claiming any part of the deceased estate. That they are contended with what the deceased gave them during his lifetime. That the applicant is wrong by purporting to distribute parcel registered under Edward Mbaya, the same being L.R. Mwimbi/Chogoria/116. It is further contended that this parcel of land does not form part of the estate of the deceased because L.R. Mwimbi/Chogoria/1000 and L.R. Mwimbi/Chogoria/116 were not in the deceased's name at the time of his death and the deceased could therefore not dispose them.

22. Notably, the green card is the most important document in the land information and management system as it contains all the pertinent information with regard to any registered parcel of land. The green cards on record show that L.R. Mwimbi/Chogoria/116 was registered under the name of Mbaya Joel Ruria on 09/12/1967 while L.R. Mwimbi/Chogoria/1000 was registered to Miriti Joel Ruria on the same 09/12/1967. It follows L.R. Mwimbi/Chogoria/116 is not available for distribution under this cause as the same does not form part of the deceased's estate.

c. Which mode of distribution should be applied?

23. **Section 2 (2) of the Law of Succession Act** provides that: -

“(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

24. It is not in dispute that the deceased in this cause died in 1969 which is before 1st July 1981 when the Law of Succession Act (Cap 160 of the Laws of Kenya) came into operation. Thus, the substantive law governing the devolution of his estate as per Section 2(2) cited above is the written laws and customs that were in force as at the time of the deceased’s death. This position was stated by my brother Justice Musyoka **In Re Estate of Nduati Mbutia (deceased) (2015) eKLR**

“The effect of Section 2(1) of the Law of Succession Act is that the provisions of the said Act are to apply to the estates of all persons dying after the commencement of the Act on 1st July 1981, subject of course to the exceptions created by the Act. The Act applies both as the substantive law as well as the procedural law to the estates affected.

Section 2(2) of the Law of Succession Act defines the application of the Law of Succession Act with respect to persons who died before the said Act commenced on 1st July 1981. The provision is categorical that the substantive provisions of the said Act are not applicable to the estates of persons who died before the said Act commenced. The substantive provisions of the Act are those governing devolution or distribution of the estate of the dead person, whether such person died testate or intestate. These provisions are to be found in Parts II, III, IV, V and VI of the Law of Succession Act. The substantive law of succession for estates of the persons who died before 1st July 1981 is not to be found in Parts II, III, IV, V and VI of the Law of Succession Act, but in the written laws and customs that applied at the date of the death of the person in question.

The second part of Section 2(2) of the Law of Succession Act states that the administration of the estates of persons who died before 1st July 1981 should commence or proceed so far as possible in accordance with the provisions of the Law of Succession Act. In other words the procedure with respect to administration of estates of such persons is to be governed, not by the law as at the time of death, but by the procedures set out in the Law of Succession Act. The said provisions in the Law of Succession Act governing procedures and processes in administration of estates are to be found in Part VII. Part VII of the Law of Succession Act applies universally to the estates of persons dying either before and after the commencement of the Act.

It is not in dispute that the deceased person the subject of these proceedings died before the Law of Succession Act came into force. Consequently, the substantive law governing devolution to his estate is that stated in Section 2(2) of the Law of Succession Act – that is the written laws and customs in force as at the time of his death in 1966.”

25. There is no evidence on record to suggest that the deceased left any valid will, whether written or oral. As such, it is right to say that the deceased died intestate. As of 1969, estates of African Kenyans who died intestate were subject to customs of the community from which such a person hailed. The deceased was a Meru by tribe and therefore as per **Section 2 (2)** of the Law of Succession Act cited above, the applicable law would be Meru customary practices in so far as it is not repugnant to justice or inconsistent with any written law.

26. Notably, the Petitioner did not adduce any evidence to show or illustrate the customs that applied at the time the deceased died in so far as the distribution of his estate is concerned. However, in **Re Estate of M’murungi M’bwiria [2019] eKLR**, the court observed that:

*“According to Eugene Conran, **Restatement of African Law: 2 Kenya II Law of Succession**, (Sweet & Maxwell, 1969) at page 30, the estate of a deceased in Meru and Tharaka community land was divided among the sons. The daughters and widows received no share from the estate.”*

27. In this regard, applying the Meru customary law would disinherit the daughters of the deceased on the basis of their gender. In **Mary Rono v Jane Rono & another [2005] eKLR**, the Court of Appeal observed as follows:

*“As a member of the international community, Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribes to the international Bill of Rights, which is the **Universal Declaration of Human Rights (1948)** and two international human rights covenants: **the Covenant on economic, social and cultural rights** and **the Covenant on civil and political Rights** (both adopted by the UN General Assembly in 1966). In 1984 it also ratified, without reservations, the **Convention on the Elimination of All Forms of Discrimination Against Women**, in short,*

“CEDAW”. Article 1 thereof defines discrimination against women as: -

“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social cultural, civil or any other field.”

In the African context, Kenya subscribes to the **African Charter of Human and Peoples’ Rights**, otherwise known as the **Banjul Charter (1981)**, which it ratified in 1992 without reservations. In **Article 18**, the Charter enjoins member States, *inter alia*, to: -

“.....ensure the elimination of every discrimination against women and also ensure the protection of rights of the woman and the child as stipulated in international declarations and conventions.”

28. The court in **Re Estate of M’murungi M’bwiria (supra)** proceeded to note that the application of customary law is qualified by **Section**

3(2) of the *Judicature Act* which provides that:

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

29. A court of law cannot invoke a customary law which is repugnant to natural justice, equity and good conscience. The promulgation of the Constitution of Kenya 2010 drastically changed the position under the retired Constitution which under **Section 82(4)** had sanctioned some discrimination in some matters of personal law, it stated-

“Subsection (1) (82(1)) shall not apply to any law so far as that law makes provision, (b), with respect to adoption, marriage, divorce, burial devolution of property on death or other matters of personal law,”

30. I observe that the Petitioner’s proposed mode of distribution suggests that the daughters of the deceased are not entitled to an equal share of the estate as the sons. In my view, the distribution of the deceased’s estate should be at par between his sons and daughters. The Petitioner’s proposed mode of distribution offends the principles of natural justice, equity and good conscience and it’s my view that the same should not be adopted by this Court.

31. The Constitution, which takes hierarchical primacy in the mode of exercise of jurisdiction, outlaws any law that is discriminatory. Article 27 of the Constitution 2010 expressly prohibits discrimination on the basis of gender or marital status. Notably, the 1963 independence Constitution equally outlawed discrimination. In my view, a custom that prohibits the inheritance rights of females is discriminatory and unconstitutional. I am therefore in agreement with the protestors’ submission that all children (daughters and sons) are equal before the law and therefore entitled to equal share of the deceased’s estate.

32. In the case of **Stephen Gitonga M’murithi v Faith Ngira Murithi [2015] eKLR**, the Court of Appeal stated 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.”

33. **Section 38** of the **Law of Succession Act** provides that:

“Where intestate has left a surviving child or children but no spouse 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.”

34. It is important to note that some beneficiaries were awarded land by the deceased *inter vivos*. Hence Section 42 of the Law of Succession Act comes into play as bequest made *inter vivos* should be taken into account under section 42 of Law of Succession Act in determining the ultimate entitlement of such beneficiaries. The said provision states that:

“Where—

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

35. In **Re Estate of Marete Mbui alias M’Marete M’Mbui alias Justus Marete (Deceased) [2017] eKLR** the court stated that:

“...section 42 of the Law of Succession Act serves two important purposes; one, it fends off selfish tendencies of human beings in seeking for double portions in the estate of the deceased;and two. It enables the court to attain equity in the sharing out of the estate property among the rightful beneficiaries.”

36. Section 28(d) of the Law of Succession Act provides that:

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

(a)

(b)

(c)

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

37. Applying the above law and in line with the constitution reality of equality, it is my view that equal distribution should be accorded to all the children of the deceased without discrimination. Accordingly, this court must take into account the property the deceased awarded to the two sons in determining the share of the net intestate estate finally accruing to the beneficiaries. Geoffrey Miriti was gifted L. R. No. Mwimbi/Chogoria/1000 and Edward Mbaya was gifted L. R. Mwimbi/Chogoria/116. The measurements of the two parcels of lands are 1.21 Ha and 3 Ha respectively. In the affidavit sworn by Mbaya Joel (Edward Mbaya) on 06/07/2020, the said Edward Mbaya has no claim over the estate of the deceased having benefited from the deceased *inter vivos*.

Conclusion

38. Taking the above into account, equity demands that the net intestate estate comprising in L. R. Mwimbi/Chogoria/199 (measuring approximately 9.9 acres) should be distributed equally amongst following beneficiaries as proposed by the protestors:

- i. The Estate of Jeremy Kaburu – 1.65 Acres- (wife Mukwagitari to hold in trust for her benefit and that of her children.)
- ii. Danstan Mutembei – 1.65 Acres
- iii. Joyce Muthoni – 1.65 Acres
- iv. Faith Kaguthi – 1.65 Acres
- v. Lucy Gatakaa – 1.65 Acres
- vi. Beth Igoji – 1.65 Acres

The grant be confirmed and distribution be as stated above. This being a family dispute each party will bear its own costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 21ST DAY OF JULY 2021.

L.W. GITARI

JUDGE

21/7/2021

Judgment has been read out in open court.

L.W. GITARI

JUDGE

21/7/2021