REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 48 OF 2014

IN THE MATTER OF THE ESTATE OF M'MUKIRA

MWAGANU alias MUKIRA S/O MWAGANU (DECEASED)

TABITHA NTIBUKA MBOROKI.....1ST PETITIONER/APPLICANT

VS

JULIUS GITONGA M'MARETE.....2ND PETITIONER/RESPONDENT

JENNIFER KAROKI MUTWIRI.....1ST INTERESTED PARTY/BENEFICIARY

MARGARET KATHURE.....2ND INTERESTED PARTY

JUDGMENT

[1] **M'MUKIRA MWAGANU alias MUKIRA S/O MWAGANU** ("the deceased") to whom this Succession Cause relates died on 5th March 1987. According to the Chief's Letter of introduction dated 22nd July 2013 it is stated that the deceased was survived by his three children namely: Paul M'Marete M'Mukira (**son deceased**), Tabitha Ntibuka Mboroki (**Daughter**) and Jennifer Karobi M'Marete (**Daughte**r). His estate is stated to be comprised of the following asset: **L R NO. ABOTHUGUCHI/KATHERI/857** (2.60 Acres).

[2] Grant of letters of administration were petitioned and issued jointly to Tabitha Ntibuka Mboroki and Paul M'Marete M'Mukira on 30th April 2014. Due to the death of the 2nd administrator on 21st December 2013 he was substituted by his son leading to grant of letters of administration intestate being issued to Tabitha Ntibuka Mboroki and Julius Gitonga M'Marete on 27th November 2014.

[3] The 1st petitioner filed Summons dated 27th September 2016 seeking confirmation of grant pursuant to **Section 71(1) of the Law of Succession Act CAP 160 Laws of Kenya and Rule 40 (1) of the Probate and Administration Rules**.

[4] The grounds upon which the application is based are set out in the application and the supporting affidavit of Tabitha Ntibuka Mboroki sworn on 27th September 2016. It is contended that the deceased having been survived by his three (3) children his estate ought to be divided equally amongst them.

[5] This was opposed vide the affidavits of the 2nd petitioner sworn on 20th March and 19th July 2017. He deponed that the estate of the deceased be divided equally amongst him and his brother John Mwiti Marete. This is because in 1987 his grandfather bequeathed him the estate in the presence John Mwiti, Paul M'Marete and Japhet M'Mbijiwe M'Mwirichia. In the said meeting he suggested that he shares the land with his brother and the deceased agreed. It was a mistake that he never sought to file for a grant of probate.

[6] The 1st petitioner through her supplementary affidavit sworn on 31st March 2017 deponed that the assertions made by the 2nd petitioner are falsehoods. The 2nd petitioner in his replying affidavit in response to her application dated 19th October 2015 stated that his father, Paul M'Marete on 19/05/2012 and 11/06/2012 indicated that the Suit Land be shared between him and his brother. Also, on 9th February 2016 he attested to his knowledge of the pleadings before the court then confirmed and no objection was raised. Thus, this is a clear admission of intestacy and not testacy; in any case, the threshold of an oral will have not been met. Moreover, the 2nd petitioner has always demonstrated hostility towards her due to her gender.

[7] Jennifer Karoki Mutwiri through her affidavit sworn on 31st March 2017 supported the 1st petitioner's mode of distribution and

corroborated her assertions. She stated that the 2nd petitioner seeks to disinherit the children of the deceased based on falsehoods. She affirmed that the deceased did not make any will of whatever nature.

[8] On 29th May 2019 it was agreed by consent that the protest be determined by way of written submissions, affidavits and statements on record. Only Japhet M'Mbijiwe M'Mwirichia was to give oral evidence.

[9] **DW1 Japhet M'Mbijiwe M'Mwiricha** tendered his statement dated 19th December 2018 into evidence. He stated that 1987 Paul M'Marete requested him to accompany him to deceased's home. The deceased bequeathed the 2nd Petitioner the Suit Land in their presence as well as John Mwiti. Then the 2nd petitioner asked that he should share the land with his brother which the deceased agreed. After a short period the deceased died.

[10] Parties also filed written submissions. The 1st petitioner submitted that the 2nd petitioner has failed to show that there was an oral will as per **Section 9 of CAP 160 Laws of Kenya**. There is a lot of uncertainty as to the authenticity of the alleged will; the alleged oral will is also tinctured with discrimination on the basis of gender. There is no justification for a grandson to inherit and immediate beneficiaries to be left to suffer. Thus, the estate be distributed amongst the children of the deceased equally. She relied on the case of **In Re Estate of Agnes Nyambura Githingi (Decased) [2018] eKLR**.

[11] The 2nd petitioner submitted that deceased left a valid will as per **Section 9 of CAP 160 Laws of Kenya** which they have evidenced through the evidence of Japhet M'Mbijiwe who was present at the time and that the deceased died shortly after. The witness' credibility was never challenged and no refractory witness was called. Hence, the estate be bequeathed to his heirs through the oral will.

[12] The interested parties submitted that the estate be distributed amongst the children of the deceased. The share of Paul Marete Mukira be shared amongst his sons, 1st petitioner and John Mwiti. Since John Mwiti is deceased his share be given to his wife Margaret Kathure.

Issues

[13] The following emerge as the issues for determination: (*a) **Whether the deceased made an oral will;** and (2) H**ow should the estate of the deceased be distributed?***

Oral will

[14] **Section 9 of the Law of Succession Act** stipulates that

> **(1) No oral will shall be valid unless—**
>
> **(a) it is made before two or more competent witnesses; and**
>
> **(b) the testator dies within a period of three months from the date of making the will:**
>
> **Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.**

Musyoka J in the case of **In re Estate of Evanson Mbugua Thong'ote (Deceased) [2016] ekLR** held:

> **"An oral will is made simply by the making of utterances orally relating to disposal of property. In assessing whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the will."**

[15] Were the oral utterances of the will made by the testator?

[16] According to the respondent, in 1987 the deceased bequeathed him the estate in the presence of his father, brother and Japhet M'Mbirijiwe. This allegation was contained in the respondent's affidavit of protest sworn on 20th March 2017. This is on or about five (5) years since this cause was initiated. He stated that it was a mistake that he never sought to file for grant of probate. In his replying affidavit dated 2nd December 2015 he stated as follows:

THAT in any event, my father on 19/5/2012 and 11/6/2012 indicated how the said land is to be utilized by myself and my brother JOHN MWITI MARETE as evidenced by the minutes marked "JGM2".

The respondent stated that this averment was just but emphasis by his father on what the deceased had uttered in 1987. However, if you look at the minutes its states that *it was agreed* and not *that it had been uttered by* the deceased in his oral will. One of the witnesses said to be present at the meeting was Japhet M'Mbijiwe. During cross- examination he stated that he did not attend the meeting of 2012. If that is the case, one wonders why his name is written as one of the members present at the meeting. Another query: who signed the minutes? Moreover, Japhet M'Mbijiwe is said to be one of the witnesses and was present in 1987 when the oral will was allegedly uttered by the deceased. Curiously, he could not remember the date when the alleged oral will was made or when deceased died. These two elements of his testimony are monumental to be completely obliterated from his memory; yet he remembered none. I doubt even passage of time would completely

erase such momentous events from one's memory. Nuances of his demeanor and the lapses in his evidence were calculated in order to create an impression that an oral will was made and the deceased died shortly thereafter without giving any measurable or definite timelines.

[17] From the foregoing I doubt that the utterances of the terms of the will were uttered as alleged by the respondent. Nothing even shows that there was any meeting in 1987 where the deceased uttered the alleged oral will.

[18] In Meru Customary Law women were not allowed to inherit. From the conduct of the respondent this court has noted in its rulings that the respondent tends to discriminate upon the 1st petitioner because she is a woman. In light of **the retired constitution as well as the Constitution, 2010** discrimination on the basis of gender is loathed. **Article 27 (1)** read together with **Article 60** provides for equality of every person before the law and prohibits discrimination on the basis of inter alia gender in any for such as customs and practices even on matter related to land and property in land.

[19] In light of the foregoing findings, I am properly grounded to make the ultimate finding on this issue; that the deceased did not utter the utterances alleged he made as his oral will. Based on the evidence and the record, the 2nd Petitioner is bent at completely disinheriting the children of the deceased who have superior right to grandchildren. I am tempted to state that it is apparent that in order to defeat the distribution proposed by the 1st petitioner, i.e. equal distribution amongst the children of the deceased, the respondent put together a claim of oral will and lined up a ''witness'' to corroborate his position. He also alluded to some meeting which allegedly took place on 19th May 2012 but he failed to sustain the lie. Accordingly, I hold that there was no oral will that was made by the deceased prior to his death.

Distribution

[20] On the issue of distribution, since the deceased was survived by his children the governing provisions are **Section 38 of the Law of Succession Act** that states:

> **"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."**

For that reason, the estate of the deceased will be distributed equally amongst the children of the deceased. With regard to the share of Paul M'Marete it will form part of his estate as his beneficiaries are entitled to his share by virtue of **Section 41 of the Act** and the principle of representation.

[21] Accordingly, the following orders commend themselves to the court and order that:

a) The grant of letters of administration intestate issued to Tabithah Ntibuka Mboroki and Julius Gitonga M'Marete on 27th November 2014 be confirmed with the estate being distributed equally amongst the persons named below:

LAND PARCEL NO. ABOTHOGUCHI/KATHERI/857

i.) Estate of Paul M'Marete M'Mukiri

ii.) Tabitha Ntibuka Mboroki

iii.) Jenniffer Karoki Mutwiri

Dated, signed and delivered in open court this 19th day of February, 2020

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F. GIKONYO

JUDGE

IN PRESENCE OF

Maneli for 1st petitioner

Mapesa for E. Kimathi for 2nd petitioner

2nd petitioner – present

1st petitioner present

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F. GIKONYO

JUDGE