



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 138 OF 2015

IN THE MATTER OF THE ESTATE OF MIRITI M'KIAMBATI (DECEASED)

DOREEN MAKENA.....APPLICANT

DORIS KIENDE.....APPLICANT

SARAH NGUGI.....APPLICANT

**ZIPPORAH NKIROTE FELIX (Suing as a legal representative of the
Estate of Nelson Murungi M'Miriti (Deceased)).....APPLICANT**

-versus-

SUSAN TIRINDI MIRITI.....1ST ADMINISTRATIX/RESPONDENT

GLADYS NKUENE.....2ND ADMINISTRATIX/RESPONDENT

BONIFACE KIRIMI KIAMBATI.....1ST PETITIONER/RESPONDENT

FRANKLIN KIMATHI..... RESPONDENT

PETER MUTHURI.....RESPONDENT

**HONESTY KANYUA (Suing as legal representative of the
Estate of Stephen Mutai M'Imanyara)..... RESPONDENT**

JAMES MURIUKI.....2ND PETITIONER/RESPONDENT

RULING

[1] Before me is a Summons for confirmation of grant dated 11/5/2017 brought under **Section 71 of the Law of Succession Act CAP 160** Laws of Kenya. The applicant seeks that the grant of letters of administration intestate issued to Gladys Nkuene M'Miriti and Susan Tirindi Miriti on 13/9/2016 be confirmed.

[2] The grounds upon which this application is grounded upon are set out in the application and the supporting affidavit of Gladys Nkuene M'Miriti sworn on 11/5/2017. It is contended that the deceased died in 1963 and his asset comprises of LAND PARCEL NO. ABOGETA/U-KITHANGARI/481 (2.64 Ha). She proposed that the estate be distribute in accordance with Kimeru Customary Law as follows:

- a) Gladys Nkuene M'Miriti (Widow) - 0.50 Acres
- b) Susan Tirindi Miriti (Daughter) - 0.50 Acres
- c) Bonface Kirimi Kiambati (Son) - 2 Acres

- d) Frankline Kimathi (Grandson) - 1 Acre
- e) Peter Muthuri (Grandson) - 1 Acre
- f) Stephen Mutai Manyara (Purchaser) - 1 Acre
- g) Zipporah Murungi (Daughter – in – Law) - Balance

[3] By an affidavit of protest of James Muriuki Murungi sworn on 27/9/2017 it was deposed that the deceased was his grandfather and had only three children Nelson Murungi, his father who is deceased, Susan Tirindi and Jane Muthoni. After the death of the deceased Gladys Nkuene got other children with other men who are Damaris Kithiru (deceased), Nancy Karambu (deceased) and Bonface Kirimi. His father was survived by his wife and six children while the deceased daughters of the deceased were survived by their children. Therefore, the estate be distributed amongst everyone with each getting half (1/2) acre. He suggested that Stephen Mutai Manyara should get nothing.

[4] The 2nd Interested Party also filed affidavit of protest sworn on 15/7/2019 on her own behalf and that of the 2nd, 3rd and 4th applicants. She averred that the deceased had only three children: Nelson Murungi, Susan Tirindi and Jane Muthoni. The others Damaris Kithiru, Nancy Karambu and Bonface Kirimi were sired by other men after the death of the deceased. Therefore, the estate ought to be distributed equally amongst the three children of the deceased. In the alternative the estate be distributed amongst the two children since Jane Muthoni is not interested in her share.

[5] This matter was heard by way of *viva voce* evidence. **PW1 Gladys Nkuene** testified that the deceased had five wives including her. All the other returned to their homes when they could not sire children with the deceased as he was impotent. Since she refused to return back home the deceased approached his younger brother one Gakiabi M’Kiambati who agreed that he sires children with her for the deceased. They got **Nelson Murungi** (deceased), **Susan Tirindi**, **Jane Muthoni**, **Damaris Kithiru**(deceased), **Nancy Karambu**(deceased) and **Bonface Kirimi**. None of them inherited Gakiabi as he just assisted the deceased to sire children. All the children were born before the deceased died.

[6] The widow stated that before filing this cause they sat down as a family and agreed on all issues. They went to the chief and obtained the chief’s letter. They also went to the clan elder where they agreed the following distribution; **Franklin Kimathi** (1 Acre), **Peter Muthuri** (1Acre), **her and all her daughters** (1 Acre), **Boniface Kirimi** (2 Acres), **Murungi’s wife and her daughters** (1/2 Acre) and **James Muriuki** (1 Acre).

[7] At the close of her case Protestor **Zipporah Nkirote Murungi** testified. She tendered her affidavit sworn on 15/7/2019 as evidence. She stated that when she married the deceased’s son Nelson Murungi she found the deceased had already died. **PW1** gave her late husband 3.53 Acres and she remained with 3 Acres. She acknowledged that her sons James Muriuki, Frankline Kimathi and Peter Muthuri were each allocated one (1) Acre each and she uses 0.52 points. Her sons Peter Muthuri and James Muriuki sold one (1) acre each to Manyara making it a total of two (2) Acres but she did not know about it. They have had no issues until her daughters sued her sons.

[8] This matter was canvassed by way of written submissions. The Interested Parties submitted by reiterating what they had earlier stated. The 1st administratrix submitted that since the deceased died before implementation of the Law of Succession Act it is only its procedure in dealing with the estate of the deceased that is applicable and not the sharing which is subject to written laws and customs. In this case the applicable law is Kimeru Customary Law whereby the surviving widow had the leeway to distribute the deceased’s estate to the requisite beneficiaries.

ANALYSIS AND DETERMINATION

[9] Two major issues have arisen in these proceedings to wit: -

a. The rightful beneficiaries of the deceased; and

b. Distribution of the estate of the deceased.

[10] The estate property is not in dispute; it is LAND PARCEL NO. ABOGETA/U-KITHANGARI/481 (2.64 Ha).

[11] The major controversy is on the beneficiaries of the deceased. According to the 1st administratrix, she and the deceased had five (5) children. She sired the children with the deceased’s brother as the deceased was impotent. The Interested Parties contended that the deceased had only three (3) children. They argued that the others were sired by her with other men after the death of the deceased.

[12] This is not a levirate relationship. A little rendition on this type of union is educative and necessary. In Meru Customary Law when a man dies his wife was allowed to enter into a levirate union with preferably her deceased’s husband younger brother and or any male relative of her deceased’s husband to have children provided the family and clan elders agree. But she may not cohabit with an elder brother, father or son of her deceased’s husband. The children resulting from this union are taken in the name of the deceased’s husband and are regarded for all purposes as the children of the deceased husband and not of the levir. [See Eugene Contran in **Restatement of African Law Kenya Volume 1 The Law of Marriage and Divorce** at page 38].

[13] The 1st administratrix admitted that she sired children with her husband’s younger brother while the deceased was alive. It was not uncommon amongst African traditions for a person who cannot sire children to allow his wife to sire children for him but with other men. This practice has not been disputed under the Meru culture by any party or authoritative source material. Whatever the case, the question

would be whether the deceased acknowledged them as his children? From the evidence of the widow is that he acknowledged them and brought them up as his children. The Interested Parties claim that three out of the six children of the deceased were sired by other men after the death of the deceased was not supported by any or any shred of evidence. The 1st Interested Party was married to the family in 1980 years after the death of the deceased between 1963 – 1964. Moreover, she stated that she heard this from their father who died and is not available to confirm this. If she heard it from their father did she mean the deceased? If so, how could she have heard this if she got married to the family after his death? Besides, she could not speak authoritatively on allegation on whether the deceased could or could not sire children. She nonetheless stated that she heard from **PW1** that the deceased could not sire children. PW1 was better placed to speak to such intimate issues. Consequently, I find the assertions made by the Interested Parties to hold no water. Accordingly, the deceased was survived by:

(1) Gladys Nkuene – Wife

(2) Nelson Murungi – Son

Survived by Zipporah Nkirote (wife) and his children: Doreen Makena Murungi, Doris Kiende, Sarah Ngugi, James Muriuki, Frankline Kimathi and Peter Muthuri

(3) Jane Muthoni – Daughter

(4) Nancy Karambu - Daughter (deceased)

Survived by her daughter Purity Ntinyari

(5) Damaris Kithiru – Daughter (deceased)

Survived by her daughter Fridah Gatwiri

(6) Boniface Kirimi - Son

[14] The deceased is said to have died between 1963 and 1964; the time when Kenya got its independence. By then the Law of Succession Act had not come into place. **Section 2 (2)** of the Act states:

“(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.” [Emphasis added]

Section 3 of the Constitution of Kenya 1963 stipulated that:

“This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

Provided that the provisions of this section as to consistency with this Constitution shall not apply in respect of an Act made pursuant to section 15A (3).”

This is similarly the case under the Constitution of Kenya 2010 which states under **Article 2 (4)** that:

“(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

[15] Meru customs are only applicable to the extent that they do not contravene the Constitution which is the supreme law of the land. Under Meru Customary Law daughters were not allowed to inherit land. This was in contravention of the Constitution which provided for equality and non-discrimination as stipulated under Section 82 and Article 27 of the Constitution of Kenya 1963 and 2010, respectively. The principles of equality have also been incorporated in the Law of Succession Act. Therefore, the administration of the estate of the deceased should be in accordance with the Act as stated under Section 2(2).

[16] Being guided by the provisions of **Part V of the Law of Succession Act** the estate of the deceased shall be distributed equally amongst the children of the deceased and the widow. The widow shall get a distinct share of the estate. [See: Court of Appeal case **Stephen Gitonga M’murithi v Faith Ngira Murithi [2015] eKLR**] As for the children of the children of the deceased who are already deceased, their share shall devolve upon their children in equal shares.

[17] Before I conclude, there is a part of the estate which is said to have been sold to one Stephen Mutai M’Imanyara. **Section 93 of the Law of Succession Act** states:

(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.

The sale agreements were entered into in 18/3/2015 and 27/1/2015 which was before the grant was confirmed. Personal representatives of the estate have no power to sell immovable property before confirmation of the grant as stated under **Section 82 of CAP 160**. Unfortunately, their interest in the estate cannot be ascertained.

[18] Accordingly, I order that:

a) The grant of letters of administration intestate issued to Gladys Nkuene M'Miriti and Susan Tirindi Miriti on 13/9/2016 is confirmed with the estate being distributed as follows:

i. LAND PARCEL NO. ABOGETA/U-KITHANGARI/481 to be shared equally among: -

- 1. Gladys Nkuene**
- 2. Estate of Nelson Murungi**
- 3. Jane Muthoni**
- 4. Estate of Nancy Karambu**
- 5. Estate of Damaris Kithiru**
- 6. Boniface Kirimi**

Dated signed and delivered in open court at Meru this 13th day of February, 2020.

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F. GIKONYO

JUDGE

In presence of

Karanja for 1st administrator

M/s Ndugwa for Gikonyo for 2nd administrator

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F. GIKONYO

JUDGE