



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 131 OF 1984

IN THE MATTER OF THE ESTATE OF JOSHUA MBIRA GITHEHU (DECEASED)

JOSIAH WANENE NDUTA..... APPLICANT

VERSUS

WILFRED MUKOMA MBIRA.....1ST RESPONDENT

JANE MUMBI KABOCHA.....2ND RESPONDENT

MARY NJERI KABOCHA3RD RESPONDENT

DAVID KARIBU NGIGI.....4TH RESPONDENT

JOSIAH KABOCHA NGIGI.....5TH RESPONDENT

RULING

1. The deceased Joshua Mbira Githehu died intestate on 23rd May 1971. He was married seven times, and therefore left seven houses each with children. On 1st March 1984 the Public Trustee was issued with a grant of letters of administration intestate. The grant was confirmed on 9th February 2000. This followed a consent by the family on the distribution of the immovable and movable properties that comprised the deceased's estate. The consent was varied on 20th February 2007, and a final certificate of confirmation issued.

2. The present application dated 27th September 2011 relates to the 3rd house. This was the house of Waithira Mbira. She had four children:-

(a) Josiah Kabocha Mbira, who died on 2nd July 2010 leaving a family;

(b) the 1st respondent Wilfred Mukoma Mbira;

(c) Wilson Ngugi Mbira, who died on 14th May 2008 leaving a family that comprises the 4th respondent David Kabiru Ngigi and 5th respondent David Kabiru Ngigi; and

(d) Mary Nduta, who died in 1989 leaving three children: the applicant Josiah Wanene Nduta, Stephen Mbira Nduta and Irene Mugure.

During the distribution of the estate, each house got 14.286%. The share for the 3rd house was distributed as follows:-

(a) Josiah Kabocha Mbira – 4.381%;

(b) Wilfred Mukoma Mbira – 4.381%;

(c) Wilson Ngugi Mbira, - 4.381%;

(d) Mary Nduta's son Josiah Wanene Nduta (applicant) – 0.541%; and Mary Nduta's son Stephen Mbita Nduta 0.541%.

3. The applicant filed the summons seeking that the shareholding of the 3rd house as shown in the certificate of confirmation be shared equally among the four children of the house, including their late mother Mary Nduta; and, after that equal sharing, the share of Mary Nduta be equally shared among the three children. Quoting the **Law of Succession Act (Cap. 160)**, the applicant stated that his late mother was entitled to equal share of the portion given to the 3rd house, but that their late mother's brothers (the 1st respondent included) had become difficult and uncooperative to the extent that they did not want them to access their entitlement so that they could move on with their lives. He stated that the intention of the respondents was to disinherit them.

4. The 1st respondent swore a replying affidavit on behalf of the respondents. Their case was that the estate of the deceased was shared under Kikuyu customary law. Under that law, Mary Nduta (who was a married daughter) was not entitled to any share in her father's estate. However, because she had left her husband and had children, her brothers had decided to give her a share of their entitlement. That was how the applicant got 0.541% and his brother 0.541%. He stated that the distribution of the estate of the deceased was negotiated by a committee that had been appointed by the District commissioner. A schedule was prepared which all the beneficiaries signed before it was filed in court. He annexed the schedule ("WMM4") to his replying affidavit which bore the signature of the applicant and his brother. It was on the basis of the schedule that the consent on the distributions was arrived at and formed the basis of the certificate of confirmation.

5. An order or judgment that has been entered into by the consent of the parties can only be set aside or varied by consent. It is trite that a consent order or judgment has a contractual effect and can only be set aside on the grounds that would justify the setting aside of a contract, or if certain conditions remain to be fulfilled which are not carried out (**Brook Bond Liebig Ltd –v- Mallya [1975] EA 266; Flora Wasike –v- Destimo Wamboka [1988] I KAR 625; and Samson Munikah t/a Munikah & Co. Advocates –v- Wedube Estates Ltd [2007] eKLR**). The grounds of setting aside are where the consent order or judgment was obtained by fraud or collusion, or but an agreement contrary to policy of the court or if the consent was given without sufficient material facts or in misapprehension or in ignorance of material facts, or, in general, for a reason which would enable the court to set aside an agreement.

6. The applicant must have had in mind **section 40** of the **Act**. The **section** provides that where the deceased died intestate and was polygamous, his net intestate estate would be divided among the houses according to the number of children in each house. The section, however, is subject to any agreement that the beneficiaries of the intestate who was polygamous may have. Under the **section**, it does not matter whether the children in each house are sons or daughters. The daughters may be married on. Each is entitled to inherit from the father.

7. Lastly, the deceased died on 23rd May 1971. Under **section 2** of the **Act**, and noting that the **Act** came into operation on 1st July 1981, the estate of the deceased was governed by Kikuyu customary law, under which married daughters did not benefit from the estate of their deceased father. This is the reason why the 1st respondent explained that, it was on humanitarian ground that the applicant's mother was provided for. This is the portion that the applicant and his brother are now entitled to.

8. I have considered the application, the rival affidavits and the written submissions by counsel. For the reasons that I have outlined in the foregoing, I dismiss the application with costs.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 8TH day of APRIL 2020.

A.O. MUCHELULE

JUDGE