



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 37 OF 2015

IN THE MATTER OF THE ESTATE OF M'MUGWIKA BAITOBI (DECEASED)

JENIFFER MWOMWATHI M'MWENDA.....PETITIONER

-versus-

SABINA KANATHI MAKUTHO.....OBJECTOR

JUDGMENT

[1] **M'MUGWIKA BAITOBI** ("the deceased") to whom this succession cause relates died on 02/05/1982. According to the Chief's Letter of Introduction dated 12/01/2015 and the petition documents, the deceased was survived by:

- a) Jeniffer Mwomwathi M'Mwenda - **Daughter**
- b) Charity Nkombo M'Imaana - **Daughter**
- c) Elizabeth Mwokiruru M'Mugwika - **Daughter**
- d) Makutho M'Mugwika - **Son**

His assets were listed as **Land Parcel No. Ithima/Antuambui/3710** (0.42Ha) and **502** (0.98Ha).

[2] Grant of letters of administration were petitioned and issued to Jenniffer Mwomwathi M'Mwenda on 14th July 2015. The petitioner applied for confirmation of grant vide her application filed on 02/12/2016. She seeks to have the estate distributed as follows:

Land Parcel No. Ithima/Antuambui/3710 (0.42Ha)

- 1. Jennifer Mwamwathi M'Mwenda - 0.30 Acres
- 2. Charity Nkombo M'Imaana - 0.20 Acres
- 3. Elizabeth Mwokiruri M'Mugwika - 0.10 Acres
- 4. Sabina Kanathi Makutho (wife of deceased) - Balance

Land Parcel No. Ithima/Antuambui/502 (0.98Ha)

Sabina Kanathi Makutho – Whole

[3] On 23/5/2018 Zipporah Karimi, daughter of the deceased, told the court that she does not know how the letters of administration were applied for. This court directed that Zipporah and other rightful beneficiaries to apply for revocation. On 24/9/2018 this court noted that Sabina Kanathi Makutho was never served with the application for confirmation of the grant. Zipporah was in court when they were directed to apply for revocation but have not done so.

[4] Later, on 26/02/2020 the court allowed the objector twenty-one (21) days to file affidavit on the mode of distribution. Upon service, the

petitioner was to file and serve further affidavit in twenty-one (21) days if necessary. At the time of writing this judgment none of the parties had complied with the directions given by the court.

ANALYSIS AND DETERMINATION

Issue

[5] The issue at hand is distribution of the estate of the deceased. Accordingly, two things must be ascertained: assets and beneficiaries of estate of the deceased.

Assets of the deceased

[6] The assets of the deceased are not in dispute; the estate of the deceased consists in; (1) **Land Parcel No. Ithima/Antuambui/3710** and **Land Parcel No. Ithima/Antuambui/502**.

Beneficiaries

[7] The Chief's Letter of Introduction dated 12/01/2015 and the petition documents filed by the Petitioner show that the deceased was survived by:

- e) Jeniffer Mwomwathi M'Mwenda - **Daughter**
- f) Charity Nkombo M'Imaana - **Daughter**
- g) Elizabeth Mwokiruru M'Mugwika - **Daughter**
- h) Makutho M'Mugwika - **Son**

[8] In the proposed mode of distribution in support of the application for confirmation of grant, she introduced another beneficiary, Sabina Kanathi Makutho, wife of the deceased.

[9] From the proceedings, yet another beneficiary, Zipporah Karimi showed up in court and claimed to be a daughter of the deceased.

[10] The above recapitulation of facts show that the petitioner did not disclose all beneficiaries to the court. She seems to bring beneficiaries on board in instalments. I also note that, other than listing his name, nothing was said of the son of the deceased, one Makutho M'Mugwika. I do not, however, find anything on which to exclude him from the estate. I will treat him as a beneficiary of the estate of the deceased. I also find Zipporah Karimi is a daughter of the deceased.

[11] From the information on record, the deceased was survived by his wife and five children.

Distribution of the estate

[12] The assets and beneficiaries of the deceased have been ascertained; a widow and five children. The governing provisions of law should be **Section 35 and 38 of the Law of Succession Act** as they have been construed and applied with such alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution as commanded by section 7(1) of the SIXTH SCHEDULE TRANSITIONAL AND CONSEQUENTIAL PROVISIONS of the Constitution as below: -

7. Existing laws

(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution

[13] Courts have made pronouncements on section 35 of the Law of Succession Act and others which limit the widow's right in the real estate of her deceased husband to a life interest; and worse still, subject it to being extinguished upon her remarrying. This is not the case with widowers. This position was incorporated in law at the time, due to the heavy influence of African tradition which excluded women from owning or inheriting land; the ugly patriarchy at its best. The ultimate yardstick- the Constitution in section 27- has, however, expressly declared such traditions and practices to be prohibited discrimination. And, therefore, laws modelled on or reflecting these biases based on gender and status are unconstitutional. But, despite these clear judicial pronouncements, no legislative action has been undertaken by the relevant bodies or organs to bring these offensive sections in conformity with the Constitution. I hope someone is listening and will act sooner rather than later.

[14] Be that as it may, the surviving spouse- husband or wife- is entitled to a distinct share in the estate of the deceased spouse. I need not remind that section 29(a) of the Law of Succession Act provides that:

For the purposes 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;

[15] See also the Court of Appeal in the case of **Stephen Gitonga M'murithi v Faith Ngira Murithi [2015] eKLR** when it held as follows:

“As for the issue of the widow having been given an outright tangible shareholding in the net intestate estate of the deceased as opposed to a life interest, we find nothing in section 40 of the Laws of Succession Act that can prevent a court of law from looking at the peculiar circumstances of each case and then determine whether to apply strictly the rule on life interest or temper with it in the interests of justice to all the affected parties. In the circumstances of this case having found that the principle in section 38 was the appropriate applicable principle, ordering a life interest would have occasioned injustice to all the dependants as opting for such an option would have only bestowed upon the widow *Naomi* a hovering interest over the individual interests of all the other beneficiaries thereby making it impossible for all the beneficiaries to enjoy freely the resulting benefits from the deceased’s estate. We find it was prudent for the learned trial Judge to accord a direct unencumbered benefit to the widow *Naomi* as opposed to a life interest.”

[16] I have used carefully chosen words- *estate of the deceased spouse or estate of the deceased*- to avoid misrepresentation or obfuscation of the right of a spouse to matrimonial property. I am aware that the Court of Appeal connected the Matrimonial Properties Act with the Law of Succession Act. Therefore, the expressions made herein should not be misconstrued but understood within the circumstances of this case.

[17] Based on the foregoing jurisprudence, the wife of the deceased should get a distinct share as the children in the estate of the deceased so that each one of them may enjoy freely their respective share without encumbrances. Here, the principle of equality in **Section 38 of the Law of Succession Act** applies and must guide the distribution of the estate. I shall so proceed.

[18] Accordingly, I confirm the grant and order that the estate of the deceased shall be distributed as follows:

LAND PARCEL NO. ITHIMA/ANTUAMBUI/3710 (0.42HA) to be shared equally amongst: -

1. Jennifer Mwamwathi M'Mwenda
2. Charity Nkombo M'Imaana
3. Elizabeth Mwokiruri M'Mugwika
4. Makutho M'Mugwika
5. Zipporah Karimi
6. Sabina Kanathi Makutho

LAND PARCEL NO. ITHIMA/ANTUAMBUI/502 (0.98HA) to be shared equally amongst: -

1. Jennifer Mwamwathi M'Mwenda
2. Charity Nkombo M'Imaana
3. Elizabeth Mwokiruri M'Mugwika
4. Makutho M'Mugwika
5. Zipporah Karimi
6. Sabina Kanathi Makutho

Dated, signed and delivered at Milimani this 7th day of May 2020

F. GIKONYO

JUDGE

Representation: -

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