



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 335 OF 2003

IN THE MATTER OF THE ESTATE OF M' RINGERA M'ARIMI (DECEASED)

AMENDEO KIOGORA.....PETITIONER

VERSUS

JENNIFFER GATABI KIOGORA.....OBJECTOR

JUDGMENT

1. On 11/12/2018 this court delivered its decision titled "Judgement". This was erroneous- yet inadvertent and honest- as the decision was not a final determination of proceedings. The error should be corrected under the slip rule in accordance with section 100 of the Civil Procedure Act. Accordingly, the decision dated 11th December 2018 is amended by deleting the title JUDGMENT and replacing thereof the title RULING.

2. Be that as it may, I note that Festus Muthaura had filed an application dated 11th June 2019 seeking this court to review its "judgment" dated 11th December, 2018. The applicant averred that this Honourable court had failed to give directions on the distribution of **L.R. No. NTIMA/ NTAKIRA/2951**.

3. Of significance is that the decision dated 11th December, 2018 did not determine distribution of the estate of the deceased. It only determined allegations of fraud raised by the **Festus Muthaura Amendeo** (*herein also referred to as "the applicant"*). It also resolved the dispute as to the actual date of death of the deceased following existence of two different death certificates. It was the courts determination that the death certificate submitted by the objector was proper hence the actual date of the deceased death was determined to be 14th July 1998.

4. On 18th February 2020 the court observed that it is only hearing of the application dated 24th September 2019 that will help attain meaningful progress in the matter. It therefore ordered the said application to be canvassed by way of written submissions and parties were ordered to file submission thereto. The application sought for rectification and confirmation of grant.

Distribution proposed by parties

5. In the supporting affidavit, Jeniffer Gatabi Kiogora proposed that the estate property be divided into three equal portions. One portion to go to Festus, Evaline and Doris. The other to Jenniffer, Agnes and Anita. While the last portion to go to Jediel, Lawrence and Aileen. She, however proposed that each portion to be held in common in equal shares.

6. Festus filed a replying affidavit as well as submissions. He disagreed with the mode of distribution proposed by Jeniffer. He stated that Jeniffer did not take into account the fact that the 2nd house already has bigger land than the 1st house. He proposed that the land be divided into two; one portion to the 1st house and the other to the 2nd house.

ANALYSIS AND DETERMINATION

7. I have considered the respective mode of distributions proposed by the parties. I should ascertain the estate property, the beneficiaries and distribute the estate accordingly.

Estate property

8. Following my ruling dated 11th December, 2018, I hereby ascertain the estate property to be: **L.R. No. Ntima Ntarika/2951**.

Beneficiaries

9. These proceedings relate to the estate of **M'Ringera M'Arimi** (*the deceased herein*) who died on 14th July 1998. He left behind **Amendeo Kiogora**. Amendeo Kiogora has since passed on leaving behind the following beneficiaries i.e. **Stella Mataria (1st wife) Festus Muthaura Amendeo, Evelin Mwarania Kiogora, Doris Naitore Kiogora, Jennifer Gatabi Amendeo (2nd wife) Agnes Kiboroi Kiogora, Anita Kinya Kiogora, Lawrence Mureti, Jediel Mugambi Muchai Aileen Kagwiria** .

Gifts

10. The objector attached green cards showing that the deceased transferred the following properties during his lifetime i.e. **Ntima Ntarika/2948 (0.267HA) to Jediel Mugambi & Jeniffer Gatabi, Ntima/Ntarika/2949 (0.267HA) to Jediel Mugambi Muchai, Ntima/Ntarika/2950 (0.267 HA) to Lawrence Mureti Amendeo, Ntima Ntarika/2952 to Festus Muthaura Amendeo and Ntima/Ntarika/2953 to Jediel Mugambi Muchai & Edward Gitonga Amendeo.**

11. The foregoing dispositions are called gifts inter vivos. Such gifts are not free property of the deceased and therefore not estate property. However, the court is obligated under section 28 and 42 of the Law of Succession Act, to take into account such previous benefit conferred by the deceased upon the beneficiaries in determining the ultimate entitlement of the donee. Section 42 of the Law of Succession Act provides as follows;

42 Previous benefits to be brought into account

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.

Distribution

12. The beneficiaries are daughters in laws and grandsons and grand-daughters of the deceased. They are not direct dependants of the deceased. They however take through the principle of representation. On this, see **Musyoka J. in the case of Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR** where it was stated as follows:

“.....grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grandchildren inherit from the parents. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

See also In re Estate of Joyce Kanjiru Njiru(Deceased) [2017] Eklr.

13. The petitioner was the sole beneficiary of the deceased. But he is also deceased, thus, the property will pass to his beneficiaries. The petitioner was polygamous hence the estate shall be distributed in terms of **Section 40 of the Law of Succession Act**.

14. Section 40 of the Law of Succession Act ascribes to equal distribution of the estate enshrined in section 38 of the Law of Succession Act. From the onset, I noted that Festus seeks the property to be divided into two; a portion for each house. This is a misconception of section 40 of the Law of Succession Act as the section provides that:

..... the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children [Underlining mine for emphasis]

15. Emphasis and the criteria of equality is not on the number of houses; but, on the number of the members of the house; children and surviving spouse. Festus based his mode of distribution on number of houses. Having said that, I will move to distribution of the estate.

16. As I stated earlier, the court takes into account the previous benefit made by the deceased to beneficiaries. This rule ensures equity amongst beneficiaries. Consequently, I find that the estate should be divided amongst the beneficiaries who did not benefit from any previous gifts from the deceased.

17. I therefore find it proper and just to distribute the estate of the deceased as follows;

NTIMA/NTAKIRA/2951

(i) Evelin Mwarania Kiogora,

(ii) Doris Naitore Kiogora,

(iii) Jennifer Gatabi Amendeo (2nd wife)

(iv) Agnes Kiboroi Kiogora,

(v) Aileen Kagwiria Kiogora,

(vi) Anita Kinya Kiogora,

18. I also order the grant herein to reflect the correct date of death of the deceased as per my decision of 11th December, 2018.

19. In the upshot, the grant herein is confirmed in the above terms.

20. As this is a family matter. I make no order as to costs. It is so ordered.

Dated, signed and delivered at Meru this 15th day of October 2020

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F. GIKONYO

JUDGE

Representation

Festus Muthaura – Present

Waweru for Mwenda Mwarania for Jennifer

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F. GIKONYO

JUDGE