



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 664 OF 2015

IN THE MATTER OF THE ESTATE OF MUTUAMWARI MUGA (DECEASED)

BERNARD RAIBU EPHANTUS 1ST PETITIONER

MERCY UKIMA 2ND PETITIONER

VERSUS

WK.....PROTESTOR

J U D G M E N T

1. **Mutuamwari Muga** (“*the deceased*”) passed on 15/11/1977. Prior to his demise, he was domiciled at **Kathathi**. According to the letter of introduction dated 18/6/2015, he left behind the following beneficiaries i.e. **Benard Raibu, Mercy Ukima, Rita Kagendo, Janet Kathambi, Timothy Bundi, Micheal Mugo (deceased), Florence Gakii (deceased), Phineas Kaburu (deceased), Gerald Meru (deceased), Lawrence Kimathi (deceased) and Jeremy Mutembei (deceased)**.
2. **Bernard Raibu Ephantus and Mercy Ukima** petitioned for letters of administration on 30/9/2015. Parcel No. **Igoji/Mweru I/158** was listed as the only asset of the deceased. Grant of letters of administration was issued to the petitioners on 29/2/2016.
3. **WK** filed an affidavit on 1/11/2016 stating that the petitioners had failed to disclose that she was the sole daughter of **Jeremy Mutembei (deceased)** who was a direct beneficiary of the estate. She subsequently filed an affidavit of protest in which she gave her own proposal how the estate should be distributed. On the other hand, the petitioners filed a summons for confirmation of grant on 1/2/2018 wherein they also set out their proposed mode of distribution.
4. The protest was heard by way of *viva voce* evidence. **Pw1 WK** testified that she was a daughter to Jeremy Mutembei. That her mother had separated with Jeremy when she was very young. She grew up in the home of the deceased being looked after by the wife of the deceased. That she was later taken over by her uncle **Micheal Mugo** with whom she lived in Marsabit.
5. She further told the Court that the petitioners had not only excluded her, but they had also excluded her uncles **Micheal Mugo** and **Gerald Meru** from the distribution. The two had left behind children. She admitted not having gone to secondary school. She did not have any birth certificate to prove her paternity as she had never seen any.
6. **Pw2 Timothy Bundi**, a brother to the petitioner, testified that the protestor was a child of **Jeremy Mutembei**. That she was born at their home and schooled there. That **Micheal Mugo**, his eldest brother had four (4) children i.e. **Ephantus Muriuki Mugo, Mark Morris Murithi, Lilian Gaki Mugo, Pamela Nkatha Mugo** who had been left out by the petitioners. He supported the protestors’ mode of distribution. He admitted having sold a ¼ of his share in 2013.
7. **Pw3 Lillain Gaki** testified that she was a daughter of **Michael Mugo**. That the protestor grew up with her family in Marsabit where her father was living. The protestor had come to reside with them from when she was in class 5.
8. **Pw4 Ephantus Mutuma Bundi**, a son to **Timothy Bundi** testified that he knew the protestor. He last saw her at the estate property when their grandmother was alive. **Pw5 Mark Morris Murithi** echoed the testimony of **Pw4**.
9. **Pw6 ER** testified that she was not married to **Jeremy** but bore with him a child in the year 1983. That after giving birth to the protestor, she left the notification birth and clinic card at the home of **Jeremy**. She brought the protestor to live with Jeremy when the protestor was only 3 years old.
10. **RW1 Mercy Ukima** testified that the family had agreed to the mode of distribution at the chief’s office. That it had been agreed that her co-petitioner was to hold three (3) acres for **Gerald Meru** and **Micheal Mugo**.

11. According to her, her sisters **Rita Kagendo and Janet Kathambi** had signed consents for her to hold the one (1) acre on their behalf. That **Jeremy Mutembei** died while in Meru GK Prison. At the time of his demise, there was no indication that he had left behind any child. That had the protestor brought a birth certificate, there would be no objection from their end. She confirmed that **Michael Mugo** had left behind four children while Gerald had left behind one child, **Benard Kibaara**.
12. **Rw2 Japheth Kirimi Muga** testified that the deceased was his elder brother. That Nyaga-advocate had brought him the affidavit dated 19/2/2018 at his house at night which he signed without knowing its contents.
13. **Rw3 Benard Kibaara** testified that he is a son to **Gerald Meru**. He denied knowing the protestor as their family was big and divided. He was very young when **Jeremy** was alive and did not know whether he had a wife.
14. From the evidence on record, the two issues for determination are; ***who are the beneficiaries of the Deceased and how shall the estate of the deceased be distributed.***
15. On the first issue, it was not in dispute that the late Jeremy was a child of the deceased and was entitled to a share in the estate. The protestor told the Court that she was born to the late **Jeremy** in 1983. That after she was born, her mother **Pw6** left her with **Jeremy** and she was looked after by **Jeremy's** mother, the wife of the deceased.
16. It was her testimony that she grew up with that family and after the demise of **Jeremy**, she was taken over by one of **Jeremy's** brothers by the name **Michael Mugo**, also deceased. She lived with **Mugo's** family at Marsabit. She did not go to secondary school. Her testimony was supported by her witnesses.
17. The protestor's mother appeared and testified as **Pw6**. She told the court that she was not married to **Jeremy** but they had a relationship that resulted in the birth of the protestor. That when the protestor was three years old, she took her to her father, **Jeremy** and the latter's family brought her up.
18. On their part, the petitioners refuted the protestor's case. They insisted that the protestor should produce a birth certificate to prove her paternity. According to them, they had never seen her at their home. That it was an attempt by their brother **Pw2** to get an additional share and sell.
19. **In re Estate of Ndongu Kabugua (Deceased) [2019] Eklr**, the court held as follows;
- "... It is accepted practice that where one wishes to prove that the deceased is the father of the children, birth certificates, identity cards, baptism cards or any other relevant documentation is tendered in evidence. The children may also be called as witnesses. ... Where evidence which would otherwise assist a party's case is not tendered, the court must draw an inference that if such evidence is tendered it would be detrimental to the party's case. ..."***
20. While I agree with the holding that documentary evidence by way of birth certificate or clinic cards are significant in proving paternity, other independent satisfactory oral evidence can be sufficient in the absence of such documentary evidence.
21. In the present case, the protestor is said to have been left to **Jeremy**, at a tender age of 3 years. She was brought up by **Jeremy's** mother. **Jeremy** himself died while the protestor was still a child. She was taken care of by one of **Jeremy's** brothers **Michael Mugo**. She never went to school beyond class 8. With such a background, it would be foolhardy to insist that the protestor produces a birth certificate.
22. There is the independent evidence of her mother, **Pw6** and her Cousins **Pw3, Pw4 and Pw5**. The Cousins would gain nothing by lying. Indeed, they would stand to lose by having their share reduced by testifying in favour of the protestor. They appeared to me to be truthful and well-meaning unlike the petitioner and her witnesses. The evidence of the petitioner and her witnesses was self-serving. I did not believe their testimony.
23. In this regard, I am satisfied that the protestor was a child born out of a relationship between **Pw6** and **Jeremy**. She was abandoned by her mother in the home of the deceased who took care of her. That is why, once **Jeremy** passed on, the protestor was taken care of by one of his brothers, **Michael Mugo**.
24. From the evidence on record, **Gerald Meru and Micheal Mugo** left behind children. Such children step into the shoes of their parents under **section 41 of the Law of Succession Act**. I therefore make a finding that the deceased left behind the following beneficiaries; **Benard Raibu, Mercy Ukima, Rita Kagendo, Janet Kathambi, Jeremy Mutembei (deceased), Timothy Bundi, Micheal Mugo (deceased), Florence Gakii (deceased), Gerald Meru (deceased)**,
25. The next issue is the distribution of the estate. The deceased left behind sons and daughters. His estate shall therefore be distributed in line with **Section 38 of the Law of Succession Act**.
26. In view of the foregoing, I allow the protest. The estate of the deceased shall therefore be distributed as follows: -

IGOJI/MWERU I/158 (2.30 HA)

- | | | |
|-----------------|---|------------|
| a) Benard Raibu | - | 0.71 Acres |
| b) Mercy Ukima | - | 0.71 Acres |

c) Rita Kagendo - 0.71 Acres

d) Janet Kathambi - 0.71 Acres

e) Timothy Bundi - 0.71 Acres

f) Ephantus Muriuki Mugo

Mark Morris Murithi

Lilian Gakii Mugo - 0.71 Acres

Equally

Pamela Nkatha

Benard Kibaara - 0.71 Acres

27. This being a family matter, each party to bear own costs.

SIGNED at Nairobi.

A. MABEYA, FCIArb

JUDGE

DATED and **DELIVERED** at Meru this 10th day of December, 2020.

JUDGE