



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 265 of 2004

IN THE MATTER OF THE ESTATE OF M'MUCHEKE MTARICHIA(DECEASED)

ISMAEL MEME MUCHEKE.....PETITIONER

VERSUS

FATUMA CIOMWENDA ABDI.....1ST OBJECTOR

HAWO ABDI MUCHEKE.....2ND OBJECTOR

RUKIA ABDI MUCHEKE.....3RD OBJECTOR

AND

OBADIAH MUGAMBI.....RESPONDENT

RULING

1. This Ruling emanates from the Application of the objectors herein dated 31st October 2018 that as would be seen in this Ruling culminated to the issue of distribution of the estate wherein the petitioner herein filed Summons for Confirmation of Grant dated 31st October 2016 which was protested to by the objectors in their letter of protest dated 3rd December 2018. The petitioner and the 1st Applicant have also filed their respective submissions dated 12th December 2018.
2. Whereas Counsel for the 2nd & 3rd Applicant on 14th November 2018 called for the expunging from the record the testimonies and position of the 1st Applicant and that of the Respondent the Court never made a determination in this respect and only called for the filing of Summons for the Confirmation of grant. Their testimonies will therefore be highlighted in whole and assist this Honourable Court in so far as regards distribution of the estate.
3. **M'muchekeMtarichia(Deceased)** died on 7th May 1993. As per the letter of the chief from Kiengu location dated 6th February 2002 the deceased left behind the following dependants; **FatumaCiomwenda (wife) Hawo Abdi (wife) Rukia Abdi Muccheke (wife) Isamel Meme, Fatuma Abdi, Jamila Abdi, Saru Abdi, Osman Abdi, Salat Abdi, Ahn=med Abdi, Hassan Abdi.**
4. Ismael Meme petitioned for Letters of administration on 14th May 2002 listing the beneficiaries as per the letter of the Chief. He also listed the properties of the estate as **Antumbetwe/ Njuone/551 & Plot No. 50 Kiungu Market.**
5. The petition was gazetted on 21st June 2002.
6. On 16th July 2002 Fatuma Abdi Kara filed objection proceedings claiming that the petitioner fraudulently and with concealment of material facts and that the petitioner was unlawfully intermeddling with the estate and to this end he is unwilling to share the deceased estate hence the beneficiaries will lose irreparably.
7. On 9th December 2008 AnyaraEmukule. J. ordered a site visit to Antumbetwe/ Nkuone /551. A report was filed by the then Executive officer, J.Mulei that revealed that the applicants herein resided in the said premisesand that the petitioner herein collected rent from Plot No. 450 which he pockets.

8. Letters of Administration were then issued to Fatuma Abdi Kara and Ismael Meme Mucheke.

9. On 31st October 2016 the Applicant's herein filed an application seeking to be substituted as administrators in place of Fatuma Abdi Kara (now deceased) and Ismael Meme claiming that the petitioner had intermeddled with the estate. They also called for the eviction of the Respondent, Obadiah Mugambi from the estate i.e. Antumbetwe/ Nkuone /551 & Antumbetwe/ Nkuone /229. They averred that the Respondent had maliciously destroyed and damaged miRAA and banana crops in the estate and that he wanted to destroy the house belonging to the estate. They annexed a O.B. Report No. 24/24/9/2016 from Maua Police Station.

10. In a change of act the 1st Applicant, Fatuma Ciomwenda Abdi filed an affidavit dated 20th February 2017 stating that they had sold land Parcel Antumbetwe/ Nkuone /229 to respondent to enable them cover a loan facility they had acquired at the AGRICULTURE Finance Corporation and that the Respondent has since been issued with the title. (Title issued on 27th March 2014).

11. The respondent equally filed an affidavit dated 31st January 2017 claiming that he is the registered proprietor of Antumbetwe/ Nkuone /2290.

12. This Honourable Court on 1st DECEMBER 2017 requested for a Survey to be done in order to establish the boundaries on Plots Nos. Antumbetwe/Nkuone /551 & Antumbetwe/ Nkuone /2290. The survey was never to materialise since the same encountered a protest from the 2nd and 3rd Applicants and their children. On 20th November 2017 this Honourable Court appointed Ismael Meme Abdi, Hawo M' Mucheke and Rukia Abdi as the joint administrators. The Imam of Kiengu Mosque and the Chief, Kiengu location were also requested to do a joint report as pertains to Antumbetwe/ Nkuone /2290.

13. The Imam- Kiunge Mosque and the Area Chief testified on 30th January 2018. The area Chief, Adam Kubai M' Limbewe, was the first to testify. He averred that he was employed in the year 1995, two years after the deceased passed on, and that he is familiar to the family and property of the deceased. He alleged that the bigger portion of the estate was occupied by the deceased whereas the smaller portion was occupied by Obadiah Mugambi. That Obadiah Mugambi had a shop in the said premises. He averred in cross-examination that the land was previously under adjudication and it is only as recent as the year 2014 that titles were issued.

14. The Imam, Mohammed Hussein testified he has been an Imam since 1991 and that his mosque borders the estate of the deceased. That Obadiah Mugambi Constructed the shop after the deceased died and specifically during Kibaki's term.

15. The court on 2nd June 2018 made Orders to the effect that Antumbetwe/ Nkuone /2290 can be claimed by the administrators in the right forum since it is in the name of the respondent, Obadiah Mugambi, the application dated 31ST October 2016 was therefore abandoned and the court directed parties to take file summons for Confirmation of grant giving proposal for the distribution of the estate.

16. On 26th June 2018 Mr Omari for the 2nd and 3rd applicant argued that the matter could best proceed by way of written submission but this was contested by Mr Mbogo for the 1st Applicant who argued that the same raised weighty issues that would best be heard through viva voce evidence. The court directed that parties file their statement and Parties did the same on respective dates.

17. The matter also proceeded via viva voce evidence.

18. The 1st Applicant presented his case and the position of the petitioner vide his testimony and three (3) other witnesses. Whereas the 2nd Applicant also testified with one (1) other witness.

1st Applicant's Testimony

19. The 1st Applicant, Pw1 was the first to testify. She testified that all parties were aware when the petitioner filed the petition for letters of administration. He stated that they are related to the Respondent herein. That Zipporah is daughter to Hezekiah Ntgori, brother to the father in law. Obadiah Mugambi is a son to Zipporah kanyi.

20. That the deceased gave Zipporah plot No. 2290 where she built a Shop and that she bought plot No. 2305.

21. That her husband, the deceased had already passed on when the land was paid for because of the loan that they had acquired in the Agriculture Finance Corporation. That Joshua Kanyi had already bought the land from the deceased and had paid a sum of Kenya Shillings thirteen thousand leaving a remainder of Kenya Shillings twelve thousand. That the loan became outstanding so they approached Zipporah to take over the purchase from Joshua Kanyi who agreed to the terms. Zipporah was to then buy the land for a sum of Kenya Shillings Sixty Thousand, which she did. That the same offset the loan from AFC and the initial deposit by Joseph Kanyi and the surplus was divided amongst the wives.

22. She averred that the deceased demarcated the land among the three houses and each house had its own portion. That the same was divided through planting of trees and barbed wire.

23. On cross-examination she testified that it is Ismael Meme who entered into the sale agreement with Zipporah Kanyi and that she wishes that the estate be distributed to the wives and their children their current portions since the status has been prevailing and each side has developed their own portions hence any other form of distribution would disturb the status quo.

24. Pw2, Joseph Kanyi testified that the deceased had sold him a plot and an agreement was written to which he was to pay Kenya Shillings twenty five Thousand. That he paid Thirteen Thousand but he did not have the balance but he agreed to Zipporah Kanyi taking up the

purchase.

25. PW3 Zipporah Kanyi testified that she bought plot no 2305 but plot no 2209 was given to her by the deceased and that the deceased did the said transfer in the year 1991 while the wives of the deceased were aware. That she then transferred the same to Obadiah Mugambi his son.

26. Pw4, Jerusha testified that he is a brother to the deceased and clearly knows the wives of the deceased. He testified that the wives of the deceased are each settled in their compounds and that the boundaries are fenced.

2nd Applicant's Testimony

27. The 2nd Applicant testified that the deceased never divided his property and that Isamel Meme sold the land without their consent. She averred that she constructed the hotel in Plot 450 and uses the same whereas the 1st Applicant constructed a Kiosk near the mosque. That the fences were built to keep away animals from invading their portions. She testified that Zipporah was not given any property by her husband, the deceased nor did the deceased sell any of his properties. She denied been aware of the loan undertaken by the Agriculture Finance Corporation nor being aware that the same was settled by the petitioner herein. She lastly averred that it is not the deceased who set up the boundaries but the petitioner herein and the 1s Applicant and that they were all dismissive of the same demarcation. She also denied ever granting consent to the petitioner to petition for letters of Administration.

28. The 2nd Applicants testimony was corroborated by Aden Halake who testified that he lived in Kiengu location for about 50 years. He testified that the deceased had given a plot to the mosque but the petitioner had sold the same. On cross examination he testified that Ismael had sold land to Zipporah and that Zipporah had constructed the Shop after the deceased died. He averred that the trees were not planted by the deceased but that the same were planted by Meme. That it is meme who demarcated the land hence the trees cannot be said to be 30 yrs old.

Analysis and Determination

29. Both parties filed their respective modes of distribution. The 2nd and 3rd Applicants called for an equal distribution of the estate among all the beneficiaries whereas the 1st Applicant called for the distribution of the estate among the houses and for the same to the distribution according to where each of the families reside.

30. This Honourable Court had instructed the surveyor to conduct a site visit to ANTUBETWE/NJUONE/551 on 21st November 2018. The 2nd and 3rd respondents have however disclaimed the surveyors report contesting that the same did not cover the whole estate since they never surveyed the plots occupied by Obadiah Mugambi.

31. The 2nd and 3rd Applicant are aggrieved by the possession of Plot No. 2290 by Obadiah Mugambi the son of Zipporah Kanja claiming he acquired the same property fraudulently. This Honourable Court has however made a determination that the issue as related to the said parcel of land can be addressed in another forum and in this case the Environment and land Court where parties may contest the said title. The same decision still stands true and is fortified by the testimony of Zipporah Kanji who averred that it is her who transferred the property to the Obadiah Mugambi.

32. The two properties that lie for distribution in the estate of M'Mucheke M'Tarichia are ***Antubetwe /Njuone/551 & Plot No. 450 Kiengo Market.***

33. It is not in dispute that the three houses, 1st to 3rd wife and their children all reside in 551. However from the report filed by the Sub county survey office Meru North the 1st applicant and the petitioner are shown to be occupying 0.51 acres compared to the 2nd and 3rd applicant and their children who occupy 0.47 acres jointly. Whether the applicants were given any land by the father of Zipporah Kanja or not has not been evidenced although such a claim was raised by the 2nd and 3rd applicants who said that 1st applicant was staying at the home of Zipporah Kanja's father and therefore is not entitled to inherit land LR. 551.

34. Although the 2nd applicant confirms that each of the widow and her children are settled on distinguished portions of LR 551 and no one disturbs the other, there is no evidence which was laid to show that it is the deceased who demarcated the boundary between his three wives.

35. Given that the deceased died intestate the Applicable Law as regards distribution of the estate of the deceased is ***Section 40 of the Law of Succession Act*** which infers equal distribution of the estate of the deceased. Courts have considered the applicability of Section 40 of the Law of Succession Act and in some respects preferred an equitable share as opposed to an equal Distribution as shown in ***In re the Estate of the Late George Cheriro Chepkosiom (Deceased) [2017] eKLR.***

36. However even in that respect there ought to be formidable proof that warrants a higher portion of the estate as opposed to other beneficiaries. The 1st Applicant herein and the petitioner have not laid a basis for their acquisition of a higher portion. The 1st applicant and the initial petitioner Ishmael Meme are only two units as opposed to the 1st and 2nd applicants and their children and it would be unfair and unjust to allow them to benefit from a bigger portion of the estate.

37. Evidence was led that Ishmael Meme sold 0.10 acres to Zipporah Kanja so as to save LR No. 551 from sale by AFC from which the deceased is alleged to have taken a loan but the 2nd and 3rd applicants dispute that claim. There is nothing to prove that they were consulted or that they benefited from the proceeds that remained after AFC was allegedly paid its money. The alleged sale to Zipporah Kanja of 0.10 acres was done before the confirmation of the grant that had been made to Ishmael Meme and the agreement does not refer to the loan that

was being paid to AFC. The documents that were produced as demand letters from AFC don't refer to LR No. 551 as having been charged for the loan. The 1st applicant, Ishmael Meme and Zipporah Kanja ought to have called a representative of AFC to come and confirm that the deceased had taken a loan from them. When this succession cause was initial filed in Maua PM's Court Succession No. 24 of 2002, Ishmael Meme Muccheke did not indicate in form P&A5 that the deceased persons estate had any liabilities.

38. This court therefore finds that LR. Antubetwe/ Njoune/551 measuring 0.98 acres should be shared equally amongst the wives and children of the deceased save that consideration should be given to individual developments already on the ground and where there is development by anyone of the parties the one taking over should compensate for such loss.

39. Plot No. 450 Kiengo market the widows of the deceased should share the proceeds of the rent equally with their children.

40. The cost of application for distribution shall be borne by each party.

HON. A. ONG'INJO

JUDGE

Ruling Delivered, dated and signed this 21 day of January 2019.

In the presence of:-

Petitioner: Present in person

1st applicant – Present in person

2nd Applicant – present in person

Rukia Abdi - present in person

Mr Mbogo Advocate for Petitioner and 1st Applicant – No appearance

Mr Omari Advocate for 2nd and 3rd applicants – Present in person

HON A.ONG'INJO

JUDGE