



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**SUCCESSION CAUSE NO.64B OF 2016**

**FORMERLY MERU SUCC. CAUSE NO.319 OF 2014**

**IN THE MATTER OF THE ESTATE OF THE LATE SEBASTIAN**

**MBAKA MUTUA alias MBAKA MUTUARUBIU (DECEASED)**

**RUCIA NKITHI SEBASTIANO.....1<sup>ST</sup> ADMINISTRATIX/APPLICANT**

**VERSUS**

**LIBERATA KAGENI MBAKA.....2<sup>ND</sup> AMINISTRATRIX/APLICANT**

**J U D G M E N T**

1. This cause relates to the estate of the late Sebastian Mbaka Mutua (deceased) who died on 12<sup>th</sup> October, 2000 at Chuka Hospital domiciled at Njuri, Meru South. The deceased died intestate and though the petition indicated that he left only 2 persons (widows) namely; Rusia Nkithi Sabastiano and Silvester Kanini Njoka surviving him, it later transpired that the deceased also left the following surviving him.

- (i) Peter Mutegi Mbaka (deceased)
- (ii) Liberata Kageni Mbaka
- (iii) Nasared Kathambi Mbaka
- (iv) Poline Kambura Mbaka
- (v) Silvia Wanja Mbaka
- (vi) Nancy Gacunku Mbaka
- (vii) Delephino Mutethia Mbaka
- (viii) Morris Murimi Mbaka
- (ix) Caroline Makena Mbaka
- (x) Naomi Gaceri Mbaka

2. The properties comprising the estate are listed as follows:

- (a) L.R. Magumoni/Thuita/1892
- (b) L.R. Magumoni/Rubate/763

3. This court appointed Rusia Nkithi Sebastiano and Liberate Kageni Mbaka as joint administratrixes on 3<sup>rd</sup> July 2018 and granted liberty to apply for confirmation of the said grant before the expiry of the statutory period of 6 months.

4. Rusia Nkithi Sebastiano, the Petitioner/applicant vide Summons for Confirmation of Grant dated 17<sup>th</sup> July, 2018 applied for confirmation of the said grant proposing that the properties comprising the estate be distributed as follows:-

(a) **L.R. NO. Magumoni/Thuita/1892 measuring 2.952 ha**

(i) Rusia Nkithi Sebastiano

(ii) Liberata Kageni Mbaka equal share

(b) **L.R. No. Magumoni/Rubate/763**

(i) Rusia Nkithi Sebastiano

(ii) Liberata Kageni equal share

5. The proposal by the 1<sup>st</sup> administratrix met resistance from Liberata Kageni Mbaka (the 2<sup>nd</sup> administratrix) who filed an affidavit of protest sworn on 4<sup>th</sup> October, 2018 deposing that the proposal by 1<sup>st</sup> administratrix is unfair to her. She has deposed that the deceased in his life time gifted Peter Mutegi Mbaka from the 1<sup>st</sup> house parcel No. Magumoni/Thuita/1511 measuring 4.30 acres. She has proposed that the estate be distributed equally among all the dependants as follows:-

**A) L.R. No. Magumoni/Thuita/1892**

(i) Lucia Nkithi - 0.729 acres

(ii) Liberata Kageni - 0.729 acres

(iii) Silvester Kanini - "

(iv) Poline Kambura Mbaka - "

(v) Silvia Wanja Mbaka - "

(vi) Nancy Gacunku Mbaka - "

(vii) Delephino Mutethia Mbaka "

(viii) Morris Murimi Mbaka - "

(ix) Caroline Makena Mbaka - "

(x) Naomi Gacera Mbaka- "

(b) **L.R Magumoni/Rubate/763 - 0.85 acres**

(i) Nazard Kathambi Mbaka - whole

6. There is no dispute in this cause that the deceased died intestate and was a polygamous man. The main bone of contention in my view is the fact that the first house belonging to Lucia Nkithi Sebastiano only had two children while in the 2<sup>nd</sup> house, the children are eight and therefore each house is preferring its proposal that would favour it.

7 I have considered the submissions made on behalf of the 1<sup>st</sup> administratrix; Mr. Nyenyire learned counsel for 1<sup>st</sup> administratrix has submitted that this court should be guided by the provisions of **Section 28** of the **Law of Succession Act** in the distribution of the estate and contended that the estate should be distributed according to the number of houses.

8. On his part Mr. I.C Mugo learned counsel for the 2<sup>nd</sup> administratrix contended that the proposition by the 1<sup>st</sup> administratrix is neither lawful nor legal. In his view the proper distribution should be done in accordance with **Section 40** of the Act with consideration that one of the beneficiaries (Peter Mutegi) had benefited from a gift *inter vivos* from the deceased.

9. This court has considered submissions by both learned counsels and the affidavits filed herein. The provisions of **Section 28** of the Act relates to the provisions of **Section 26** of the same **Law of Succession Act** which relates to provisions for dependants not adequately provided for by either a will be a deceased person dying testate or the provisions of intestacy. In this cause the circumstances do not call for the application of **Section 28** of the Act as no dependant has moved this court pursuant to the provisions of **Section 26** of the Act.

Secondly both parties are in consensus that the Section on intestacy adequately covers both houses in this cause.

10. As I have observed above the deceased in this cause died intestate and was polygamous. The provisions of **Section 40** of the Act provides that in such a scenario, the net estate is divided among the houses according to the number of children in each house, adding any wife surviving him as an additional unit. In this cause the deceased left behind two widows and ten children. One of the children (Peter Mutegi- now deceased) is said to have benefitted from a gift of 4.3 acres from the deceased during his lifetime. The 2<sup>nd</sup> administratrix swore an affidavit to that effect and there is no rebuttal filed to deny the fact. That means that the fact is uncontested and therefore **Section 42** of the Act does apply in the sense that the previous benefit is taken into account to ensure equity and equality in the distribution of the estate. Taking everything into consideration, the estate of the deceased should be divided into eleven units given the size of the properties comprising the estate. In the premises, the grant issued to the administratrixes herein on 3<sup>rd</sup> July, 2018 is hereby confirmed as per the following mode of distribution.

(a) **L.R. No. Magumoni/Thuita/1892 - 7.29 acres**

- (i) Lucia Nkithi Sebastiano
- (ii) Liberata Kagani Mbaka
- (iii) Nasared Kathambi Mbaka
- (iv) Poline Kambura Mbaka
- (v) Silvia Wanja Mbaka equal share
- (vi) Nancy Gacunku Mbaka
- (vii) Delephino Mutethia Mbaka
- (viii) Morris Murimi Mbaka
- (ix) Calorine Makena Mbaka
- (x) Naomi Gaceri Mbaka

(b) **L.R. Magumoni/Thuita/763- 0.85 acres**

- (i) Silvester Kanini - whole

This being a family matter, I shall make no order as to costs.

**Dated, signed and delivered at Chuka this 16<sup>th</sup> day of January 2019.**

**R.K. LIMO**

**JUDGE**

**16/1/2019**

Judgment signed, dated and delivered in the open court in presence of Nyenyire for Applicant and 2<sup>nd</sup> administratrix in person.

**R.K. LIMO**

**JUDGE**

**16/1/2019**