



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**SUCCESSION CAUSE NO. 5 OF 2015**

**IN THE MATTER OF THE ESTATE OF THE LATE M'MURAA M'RUTERE ALIAS JOANARE MUREGA (DECEASED)**

**AND**

**REGINA KAGWE MURAGA.....PETITIONER**

**VERSUS**

**DOMINIC KIRIANKI.....PROTESTOR**

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

1. This cause relates to the estate of the late **JOANARE MURAGA Alias M'MURAA M'RUTERE** (deceased) who died on 28<sup>th</sup> May 2007 at St. Mary's Hospital resident at Meru Central. According to the petition for letters of administration the deceased died intestate and left the following dependants;

- (i) Regina Kagwe Muraga -widow
- (ii) Joyce Mughaga
- (iii) Rita Kaguru Nyaga
- (iv) Esther Karimi
- (v) Anthony Kathure
- (vi) Mwenda Lonne Erick Muga
- (vii) Lucy Nkatha
- (viii) Christine Kagendo Paul &
- (ix) Josephine E. Wanja

2. The estate of the deceased comprise the following listed properties.

- (i) Igoji/Gikui/393
- (ii) Igoji/Gikui/1755
- (iii) Igoji/Gikui/1774
- (iv) Igoji/Gikui/1757

(v) Igoji/Gikui/1763

3. The petitioner in this cause, Regina Kagwe Muraga was initially appointed the administratrix of the estate herein vide a grant issued on 21<sup>st</sup> June, 2011. The Petitioner then moved this court vide Summons for Confirmation of Grant dated 17<sup>th</sup> October, 2017 for confirmation of the grant proposing that the estate be distributed as follows;

**a. L.R. Igoji/Gikui/1763**

- (i) Joyce Muthaga - 20x80 feet
- (ii) Rita Kaguru Nyaga - 20x80 feet
- (iii) Esther Karimi - 20x80 feet
- (iv) Christine Kagendo Paul - 20x80 feet
- (v) Antony Kithure Muraga - 20x80 feet
- (vi) Josphine E. Wanja - 20x80 feet
- (vii) Lucyline Nkatha - 20x80 feet
- (ix) Mwenda Ronnie Eric Muga - 20x80 feet
- (x) Regina Kagwe Muraga - Remaining balance

**b. L.R. Igoji/Gikui/392**

- (i) Antony Kithure Muraga - 1 acre
- (ii) Mwenda Ronnie Eric Muga - 1 acre
- (iii) Joyce Muthaga - 0.5 acre
- (iv) Rita Kaguru Nyaga - 0.5 acre
- (v) Esther Karimi - 0.5 acre
- (vi) Christine Kagendo Paul - 0.5 acre
- (vii) Emily Wanja - 0.5 acre
- (viii) Lucyline Nkatha - 0.5 acre
- (ix) Regina Kagwe Muraga - 0.5 acre

**c. L.R Igoji/Gikui/1755**

- (i) Lawrence Kinegeni Mugambi - 20x80 ft
- (ii) Regina Kagure Muraga - Balance

**d. L.R Igoji/Gikui/1757**

- (i) John Peter Kirimi Muindi - 25x80 ft
- (ii) Regina Kagwe Muraga - Balance

**e. L.R Igoji/Gikui/1754**

- (i) Regina Kagwe Muraga

4. The Petitioner's proposal met some resistance from Dominic Kirianki who filed affidavit of protest sworn on 5<sup>th</sup> July 2018 and 20<sup>th</sup> September, 2018 claiming that he is a stepson of the Petitioner and a son of the deceased herein. He has claimed that he should also be

included as a beneficiary.

5. When the matter was fixed for hearing of the protest, the protestor (PW1) told this court that he was born in 1962 and that his mother one Priscilla Wanja Maota though, was not married to the deceased. He claimed that the deceased paid his school fees and even informed his other children about him with a view to acceptance as a family member. He further alleged that the deceased rented premises for him within Kieni Kiandegge Market and besides that showed him a piece of plot at Kieni Kiandegge Market measuring 20x80 ft and told him to put up a house which he says he did.

6. The protestor's position was supported by Priscilla Wanja Maota (PW2) who testified that she was the mother of the protestor and that she had a relationship with the deceased herein which resulted to the birth of the protestor. She however conceded that the relationship was not formal and that she got married to someone known as Gukana who took her and the protestor though he is reported to have been insisting that the protestor needed to go back to his father. According to Priscilla (DW2), the deceased paid fees for his son (protestor) and that he even paid her KShs.10,000/- for the role she had played in bringing him up.

7. Domiciano Murungi (PW7) also testified and told this court that the deceased herein prior to his demise confided to him that the protestor was his son. He confirmed the protestor's allegations that the deceased had gifted him a 20 by 80 feet plot at Kieni Kiandegge Market. He further stated that the deceased was his uncle and knew him well and all his children.

8. On her part, the Petitioner administratrix (DW1) denied knowledge of the protestor and his claim. According to her the deceased had 9 children and that the protestor is not one of them. She testified that the deceased introduced her to two other children namely Mwenda Lonne Erick and Lucy Nkatha who were both brought to their matrimonial home when young and she brought them up with her own children whom she named as follows:-

(i) Joyce Muthaga

(ii) Rita Kaguru

(iii) Esther Karimi

(iv) Christine Kagendo

(v) Antony Kithure &

(vi) Emily Wanja

9. The Petitioner in addition to the above denied ever seeing the protestor in any of the properties comprising the estate stating that she had never seen him before. She further tendered in evidence the Eulogy of the deceased which was read in his burial (D.Exhibit 1) which does not mention the protestor as one of the children of the deceased. She argued that the two children who were later brought by the deceased were recognized in the Eulogy and that had the protestor been one of them, his name would have been included in the Eulogy. She further denied that the protestor has put any development in any of the properties comprising the estate.

10. Paul M'Irichia (DW2) testified and supported the petitioner's position. He told this court that he had known the deceased since 1958 and that he was a son in and law very close to him. He further added that if the protestor was a son of the deceased he would have known as the deceased according to him used to confide in him a lot.

11. This court has considered the protest filed herein and the brief evidence tendered by both parties. The only issue for determination in this cause is whether the protestor herein is a dependant as stipulated under **Section 29 (a)** of the **Law of Succession Act**.

12. The protestor has submitted that the protestor's mother testified and stated that the deceased is the father of the protestor. In protestor's view, that is sufficient evidence to persuade this court that the protestor must be a dependant since a mother would always know who the father of her child is.

13. I have however considered the evidence tendered by the protestor and find that the evidence is merely his word against that of the petitioner. It is important to note that whoever alleges has the burden to prove as clearly provided under **Section 107** of the evidence. This court finds that the protestor had the burden to prove that he is a dependant by virtue of being a biological son of the deceased. The standard of proof in this instance is on a balance of probability. He says that the deceased paid his fees and supported him but there was no evidence tendered to show that the deceased paid any fees or supported him in any way. I have also noted that he has claimed that he was shown a plot 20x80 ft at Kieni Kiandegge Market where alleges to have put up a structure but when pushed to prove he alleged that the petitioner had brought it down. However there is no evidence tendered to show that a report of that kind was ever made to the police to prove that a report on malicious damage to property was ever made against the protestor herein.

14. The protestor has claimed that the deceased prior to his demise had told everyone about him but looking at the contents of Eulogy tendered as D. Exhibit 1, that evidence is unsupported. Furthermore none of the deceased's brothers or his clansmen came to court to testify to confirm that indeed the protestor is a son of the deceased.

15. Besides the above, this court noted during trial that the protestor's Identity Card had no name connecting him to the deceased. He also did not tender any birth certificate to proof that the deceased was his father. In the case of ***Re Estate of Patrick Mwangi Wathiga [2015]***

**eKLR**, the court held that proof of paternity is on a balance of probability and it frowned upon the practice where someone crops up to lay claim on an estate of a deceased after his death when no known relationship existed during the lifetime of the deceased.

16. In this case, the protestor failed to even produce a Chief's letter connecting him to the deceased. He claims that the Chief failed to write an introductory letter because he is interested in the estate but I find such allegations baseless because they are not supported by evidence.

17. In the case of ***EMM-VS- IGM (Court of Appeal No.114/2012 Nairobi) [2014] eKLR*** the Court of Appeal held that it was not enough for someone to show that the deceased used to assist him because assistance at times can be out of generosity or mercy. The court held that a proof of reasonable degree of permanency to show the deceased had assumed parental responsibility is necessary and that given the evidence that had been tendered the appellant had not proven that he was a biological son to the deceased or proved dependency. The provisions of **Section 3(2) of the Law of Succession Act** define a child in reference to a made person as "**any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.**" The law does not recognize the contention by the protestor's counsel that the mother's word is sufficient proof so far as paternity is concerned. If that was the case, chaos would have ensued wherever a rich or influential person dies as all sorts of claims would come up most of which could be speculative at best. It is therefore imperative that a court must be persuaded to the required standard that someone claiming to be a child of the deceased is actually one.

18. The protestor claims that the deceased gave him 20x80 ft of a plot in Kieni Kiandegge but he did not supply to court the particulars of the plot or anything to back up his claims. The Eulogy produced by the petitioner was never supported the protestor's claim. In view of the foregoing this court finds that the protestor has not shown any tangible proof of ties with the deceased save for the word of mouth by his mother which I find unreliable and insufficient to discharge the *onus* of proof. The protest by the protestor is therefore unsustainable in law.

In the premises the Summons for Confirmation of Grant dated 17<sup>th</sup> October, 2017 is allowed as per paragraph 4 of the Supporting Affidavit of Regina Kagwe Murage as all the dependants of the deceased are in agreement. I make no order as to costs.

**Dated, signed and delivered at Chuka this 18<sup>th</sup> day of February, 2019.**

**R.K. LIMO**

**JUDGE**

**18/2/2019**

Judgment dated, signed and delivered in the open court in the presence of Kimathi for Petitioner (present) and Dominic Kirianki in person.

**R.K. LIMO**

**JUDGE**

**18/2/2019.**