



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO.60 OF 2016

(FORMERLY MERU HIGH COURT SUCC. CAUSE NO.567 OF 2014)

IN THE MATTER OF THE ESTATE OF M'NGERETHA M'MUNYUA ALIAS JOSEPH NGERE MUNYUA (DECEASED)

AND

CIAMBUBA NGERE MUNYUA.....PETITIONER

VERSUS

JULIESTA KANINI NJERU.....PROTESTOR

J U D G M E N T

1. This cause relates to the estate of the late **M'NGERETHA M'MUNYUA Alias JOSEPH NGERE MUNYA** (deceased) who died on 24th December, 2014 resident at Mucwa Sub-Location, Meru South. The petition filed and the record shows that the deceased was polygamous and died intestate leaving the following dependants namely:-

- (i) Ciambuba Ngere Munyua - 1st wife or widow
- (ii) Juliesta Kanini Njeru - 2nd wife /widow
- (iii) Mbaka Ngere Munyua
- (iv) Mugendi Ngere
- (v) Gantiku Ngere
- (vi) Antony Murimi Gitonga
- (vii) Henry Ngere
- (viii) Mwenda Kariuki (grandson)
- (ix) Penina Gatakaa
- (x) Florence Karimi Ngere
- (xi) Pamela Wasuka Ngere
- (xii) Ellyjoy Gatakaa M'Munyua
- (xiii) Jane Kageni Ngere

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

- a. Karingani/Ndagani/3946

b. Karingani/Ndagani/5374

c. Karingani/Ndagani/5372

d. Plot 2461 Mariani Adjudication Section.

3. The two widows, Ciambuba Ngere Munyua and Juliesta Kanini Njeru were appointed joint administratrixes on 8th May 2017 and both the administratrixes were given liberty to move this court for confirmation of grant before the expiry of the statutory period. On 2nd June 2017, Ciambuba Ngere Munyua, (1st administratrix) moved this court to confirmation of the said grant vide Summons for Confirmation of Grant dated 2nd June 2017. In her application she deposed that the estate of the deceased originally was comprised in Karingani/Ndagani/389 and that the same comprised 8 acres. She further deposed that the parcel No. 389 was subdivided into 5 acres, 2 acres and 1 acre with one acre going to the 2nd wife or 2nd administratrix. She further deposed that 2 acres were sold by the deceased and the 2nd wife benefited from the proceeds of sale and listed the following properties as having gone to her namely:-

a. Karingani/Mariani/1512- 1.12 ha

b. Karingani/Mariani/2395- 0.08 ha

c. Karingani/Ndagani/2323- 0.518 ha

d. Karingani/Ndagani/839- 0.04 ha

4. On the basis of the above, the 1st administratrix proposed that the remaining 5 acres of the estate be distributed as follows:-

(A) Karingani/Ndagani/5374

- (i) Ciambuba Ngere Munyua - 0.68 acres
- (ii) Mbaka Ngere Munyua - 0.73 acres
- (iii) Penina Gatakaa - 0.05 acres
- (iv) Wilfred Mugendi Ngere - 0.73 acres
- (v) Gilbert Gatinku Ngere - 0.73 acres
- (vi) Mwenda Kariuki Ngere - 0.48 acres to be held by Ciambuba Ngere Munyua in trust.

(B) Karingani/Ndagani/3946

- (i) Ciambuba Ngere Munyua - 0.47 acres
- (ii) Antony Murimi - 0.73 acres

(C) Karingani/Ndagani/3944

- (i) Mbaka Ngere Munyua - whole

(D) Karingani/Ndagani/5373

- (i) Mbaka Ngere Munyua - 0.38 acres
- (ii) Henry Joseph Ngere - 0.13 acres

(E) Karingani/Mariani/2461

- (i) Gilbert Gitari Bore - whole

5. On the other hand the 2nd administratrix moved this court to confirm the grant and adopt her following proposal namely:-

(a) Mariani Adjudication Section No.2461- 1 acre

(i) Juliesta Kanini Njeru - whole

(b) L. R Karingani/Ndagani/5374

- (i) Ciambuba Ngere Munyua 0.73 acres
- (ii) Mbaka Ngere Munyua - 0.73 acres
- (iii) Mwenda Kariuki Ngere - 0.48 acres
- (iv) Mugendi Ngere - 0.73 acres
- (v) Gatinku Ngere - 0.73 acres

(c) L.R. Karingani/Ndagani/3946

Juliesta Kanini Njeru

(d) L.R. Karingani/Ndagani/3944

Juliesta Kanini Njeru

(e) L.R. Karingani/Ndagani/5372

Ciambuba Ngere Munyua

6. This court directed the 2nd administratrix to file a protest to the Summons for Confirmation of Grant dated 2nd June 2017 with a view to canvassing the dispute in an orderly and procedural way. The protestor filed an affidavit of protest on 18th August, 2017 sworn on 21st July, 2017. In her affidavit, she avers that she is the 2nd wife of the deceased. She proposes that she get 1 acre comprised in Mariani Adjudication Section, in addition of parcel No. Karingani/Ndagani/3946 and Karingani/Ndagani/3944.

7. In her oral evidence before court, the 2nd administratrix told this court that the deceased had told her that because she had only 2 daughters, her co-wife would later cause her problems and that the deceased proposed to divide his 8 acre estate into 2 portions of 4 acres each for each house besides one shop each for each house. She further added that the clan prevailed upon the deceased to consider that the 1st house had many sons and that the deceased agreed to have the 1st house get 5 acres while the 2nd house get 3 acres. She further added that she has been living in the 3 acre share comprised in Karingani/Ndagani/3946 and 3944 respectively and that she has one acre in her own name while the 2 acres remain in the name of the deceased. She has also stated that parcel No. Karingani/Mariani Adjudication Section/2395 and 1512 are her own parcels which she bought even before the deceased subdivided his estate into 5 acre and 3 acre portions.

She asked this court to give her 2 acres in the estate to add to her one acre which she concedes was given to her by the deceased during his lifetime. It was her evidence that parcel No.Karingani/ Mariani Adjudication Section measures one acre and that the same is adjacent to parcel Numbers Karingani/ Mariani 2395 and 1512 which are registered in her name. She conceded that when she was married by the deceased, she already had 3 daughters but that the deceased took care of them and educated them.

8. The protestor presented two witnesses, Salesio Muchiri Murianki (PW2) and Patrick Micheni Bundi (PW3) both of who supported her contention that the deceased prior to his demise had indicated that his 8 acre estate be divided into 2 portions with 5 acres going to the 1st house and 3 acres going to the 2nd house.

9. On the other hand, the 1st administrator, told this court that she was the 1st wife of the deceased and had 7 children namely:-

- (i) Mbaka Ngere
- (ii) Gatakaa Ngere
- (iii) Gitonga Ngere
- (iv) Gatinku Ngere
- (v) Henry Ngere

(vi) Mugambi Ngere &

(vii) Kariuki Ngere

10. The 1st administratrix testified that the 2nd administratrix and his co-wife benefited from parcels of land gifted to her during the lifetime of the deceased and asked this court to distribute the remaining net estate only to her and her children.

11. This court has considered both the petitioner's/1st administratrix's case. I have also looked at the protestor's case. The 1st wife/1st administratrix is of the view that the 2nd wife or protestor was adequately provided for during the lifetime of the deceased and so contends that what is remaining or the net estate which is almost 8 acres be distributed to her and her children, a proposal vehemently opposed by the protestor. It is her wish that parcel No. Mariani Adjudication/2461 and parcel Numbers Karingani/Ndagani/3944 and Karingani/Ndagani/3946 be given to her while parcel Numbers Karingani/Ndagani/ 5374 and Karingani/Ndagani/5375 be given to the applicant.

12. There appears to be some confusion or lack of clarity as to the actual identities of the properties comprising the estate because what is listed on the petition and the affidavits are not in tandem with the evidence tendered. The parties in this cause state that parcel No. Karingani/Ndagani/839 originally measured 8 acres and the same was divided into 3 portions of 5 acres, 2 acres and 1 acre. There is then a mention of parcel No. Karingani/Ndagani/389 which this court presumes is a typographical error and parcel No. Karingani/Ndagani/1177.

13. This court has perused through the documents filed through affidavits in this cause and what is apparent is that parcel No. L.R.Karingani/Ndagani/1177 is the parent title held by the deceased from 10th June 1977. The same was then sub-divided into parcel Numbers Karingani/Ndagani/3223 and Karingani/Ndagani/3224 in 1984. It is not disputed that the 2nd wife/protestor benefitted from parcel No. Karingani/Ndagani/3223 which was one acre. Parcel No. Karingani/Ndagani/3224 (Approximately 7 acres) was left in deceased's name and subdivided into Karingani/Ndagani/3943 (2.025 ha), parcel Karingani/Ndagani/3944(0.1ha) and parcel No. Karingani/Ndagani/3945 (0.101 sold to one Ishmael Nyaga), and parcel No. Karingani/Ndagani/3946 (0.607 ha). Parcel No. Karingani/Ndagani/3943 was further subdivided into parcel No. Karingani/Ndagani/5210 and Karingani/Ndagani/5211. Parcel No. Karingani/Ndagani/5210 (0.202ha) was transferred by deceased to one Francis Mukuuri in 2001 and later combined with parcel No. Karingani/Ndagani 5374 and Karingani/Ndagani/ 5375 Parcel No. Karingani/Ndagani/3945 was subdivided into parcel No. Karingani/Ndagani/6295 and Karingani/Ndagani/6296 and it's unclear why no one is claiming any interest on it and this court assumes that might be the parcels were sold by the deceased. Parcel No. Karingani/Ndagani/839 (0.04 acres) was transferred to the 2nd wife/protestor and issued with a title in 1995. That seems to be the one that was developed and sold by the protestor at Kshs.1.2 million to John Gitonga in 2013 after the caution placed by one of the sons from the 1st house was removed. That properly now cannot be said to be part of the estate in this cause. The protestor indicated that she sold the property and used part of the proceeds to educate her children.

14. In light of all the above, and as confirmed by the 1st administratrix in her affidavit sworn on 6th June 2014 the available parcels for Karingani/Ndagani/3944 (0.101 ha), Karingani/Ndagani/3946 (0.607 ha), Karingani/Ndagani/5372 (0.17 ha) and Karingani/Ndagani/5374 (1.328 ha) totaling approximately 3.21 ha or 7.92 acres. The protestor confirms this position in her undated statement filed on 18th September 2018 as an annexure to "*protestors supplementary list of witnesses.*" dated 17th September 2018.

15. There are also other parcels in dispute which are in an Adjudication Area. The same are Karingani/Mariani/1512, 2395 and 2461. According to the 1st wife, the deceased bought these parcels and gave parcels Nos. Karingani/Mariani/Adjudication Section 1512& 2395 to the 2nd wife. The 2nd wife however claims to have bought the parcels herself using her own resources stating that she is a business-lady.

16. It is also apparent that parcel No. Karingani/Mariani/2461 was sold by one of the sons of the deceased to one Gilbert Bore. The purchase appears to be the one currently occupying that parcel though the evidence is scanty but what is clear is that the parcel is in the name of the deceased and there is no evidence that the transaction was legitimate as it offends **Section 45, 55 (1) & 82 of Law of Succession Act** so though the 1st administratrix proposes to give Gilbert Bore that parcel there is nothing in law to support that distribution because Gilbert Bore is not listed as one of the dependants of the deceased.

17. This court heard from the 1st wife about the allegations that Mariani Adjudication Section 1512 and 2395 were bought by the deceased in favour of the 2nd wife. There were no evidence to back up those claims as the 1st wife/protestor denied the allegations stating that she bought the parcels using her own resources. In view of the fact that whoever alleges must prove to the required standard, this court finds that the 1st wife's allegations have not proven in respect to those two parcels No. Karingani/Mariani/1515 and 2395 and this court cannot treat as either part of an estate or a gift for purposes of **Section 42 of the Law of Succession Act**. I am however persuaded given the documents exhibited in this cause that the 2nd wife/protestor indeed benefitted from parcel Nos Karingani/Ndagani/839 (measuring 0.04) and 3223 measuring 1 acre.

18. The law applicable in the distribution of an estate of a polygamous dying is provided for under **Section 40 of Law of Succession Act**. The law provides that the net estate is in first instance divided according to the number of houses and according to number of children in each house with the surviving widow(s) being added as an additional unit.

19. There is little dispute as to who the dependants are in this cause though the position of the 1st wife was that the 2nd wife was married when she already had her children. The 2nd wife's position is that though she conceded during hearing on 5th September, 2016 that indeed she came with three daughters when she was married in 1983, she stated that the deceased took care of all of them and educated them. The three daughters namely; Joyce Gatakaa Ngere, Jane Kageni Ngere and Florence Karimi Ngere do therefore qualify to be considered as dependants as provided under **Section 29(b) Law of Succession Act** but Pamela Wacuka Ngere automatically qualify as a dependant as provided under **Section 29(a) of Law of Succession Act**. It is this court's finding that a dependant under **Section 29(a)** ranks higher in priority in terms of entitlement of the estate than dependant under **Section 29(b) of Law of Succession Act**. So while both dependants in

(i) Henry Migwi Ngere - 0.22 acres

(ii) Pamela Wacuka Ngere - 0.20 acres

(c) L.R No. Karingani/Ndagani/3946 (1.51 acres)

(i) Pamela Wacuka Ngere - 0.39 acres

(ii) Peninah Gatakaa - 0.59 acres

(iii) Joyce Gatakaa Ngere - 0.53 acres

(d) L.R Karingani/Ndagani/3944 (0.25)

(i) Jane Kageni Ngere - whole

(e) Mariani/Adjudication Section/2461- (1 acre)

(i) Florence Karimi Ngere - 0.5 acres

(ii) Antony Murimi Gitonga - 0.5 acres

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

Dated, signed and delivered at Chuka this 13th day of February, 2019.

R.K. LIMO

JUDGE

13/2/2019

Judgment signed, dated and delivered in presence of Protestor and Petitioner.

R.K. LIMO

JUDGE

13/2/2019