



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 610 OF 2012

In The Matter Of The Estate Of Joel M'tutuchiu Baitanyai (Deceased)

JENNIFER MUTHONIPETITIONER

VS

SIMON GITOBU M'TWARUCHIU.....1ST PROTESTOR

RUTH KATHUNI.....2ND PROTESTOR

MARY GAKII JOEL.....3RD PROTESTOR

JUSTA MUTHONI..... 4TH PROTESTOR

JOEL MUTHONI NGAKU..... 5TH PROTESTOR

JUDGMENT

[1] **JOEL M'TUTUCHIU BAITANYAI** (“the deceased) to whom this Succession Cause relates died on 10th May, 2002. The petitioner petitioned for letters of administration and stated that the deceased was survived by:

- 1. Jennifer Muthoni - Widow**
- 2. Simon Gitobu M'Twaruchiu - Son**
- 3. Mary Gakii - Daughter**
- 4. Charity Karegi - Daughter**
- 5. Alan Mwiti - Grandson**
- 6. Jacob Kinoti - Son**
- 7. John Mbaabu M'Twaruchiu - Son**
- 8. Robert Kimathi Joel - Son**
- 9. Charity Karambu M'Nkanata - Daughter in law**
- 10. Martin Mutahi M'Twaruchiu - Grandson**
- 11. Ruth Kathuni Odhiambo - Daughter**

His assets were listed as:

1. Land Parcel Number Kiirua/ Ruiri/1951
2. Land Parcel Number Kiirua/Ruiri/1724
3. Land Parcel Number Kiirua/Ruiri/1723
4. Land Parcel Number Kiirua/Ruiri/1725
5. Land Parcel Number Kiirua/Ruiri/1727
6. Land Parcel Number Kiirua/Ruiri/1728

[2] A grant of letters of administration intestate was made to the Petitioner on 3rd June 2013. She then applied for confirmation of grant dated 18th December 2013 wherein she proposed the estate to be distributed as follows:

- (i) Land Parcel No. Kiirua/Ruiri/1723 (0.607 Ha) John Mbaabu M'Turuciu
- (ii) Land Parcel No. Kiirua/Ruiri/1724 (0.607 Ha) Jacob Kinoti Joel
- (iii) Land Parcel No. Kiirua/Ruiri/1727 (0.607 Ha) Robert Kimathi Joel
- (iv) Land Parcel No. Kiirua/Ruiri/1728 (0.607 Ha) Charity Karambu M'Nkanata alias M'Nkanatha
- (v) Land Parcel No. Kiirua/Ruiri/1725 (0.405Ha) Martin Mutai M'Twaruciu
- (vi) Land Parcel No. Kiirua/Ruiri/1951 (0.972Ha)
 - a. Jennifer Muthoni, Jacob Kinoti, John Mbabu M'Twaruchiu , Robert Kimathi Joel & Charity Karambu M'Nkanata to hold jointly 0.3 Ha
 - b. Jenniffer Muthoni , Mary Gakii jointly & Charity Karegi 0.272 HA to holdin equal shares
 - c. Alan Mwiti Joel - to hold 0.4 HA

[3] The petitioner explained that in the deceased's lifetime he gave Ruth Kathuni Odhaimbo and Simon Gatobu M'Itwirachiu their respective shares of land. As for Alan Mwiti Joel and Martin Mutai M'Ituruchiu, the deceased brought them up as his own children, educated them and provided for them their respective parcels of land.

[4] Thereafter, protests were filed by the protestors against the application for confirmation of grant. The **1st protestor**, Simon Gitobu M'Twaruchiu in his affidavit of protest sworn on 6th June 2014 stated that he and his sister Ruth were left out of the distribution. He averred that the deceased gave him title No. Nkwene/Kathara/344 (0.5 Ha) and further stated that he should get ½ acre out of title No. Kiirua/Ruiri/1951 so that he may be at par with his other siblings. As for Ruth, the deceased paid her with one acre for he was indebted to her for the money she gave him. He is in agreement with the petitioner's mode of distribution paragraph 5 (i) – (v) but not with (vi). He proposes that No. Kiirua/ Ruiri/1951 to be shared equally amongst Jenniffer Muthoni, Mary Gakii, Farida Karegi Rama, Ruth Kathuni Odhiambo, Alan Mwiti Joel and himself.

[5] The **2nd protestor**, Ruth Kathuni Odhiambo in her affidavit of protest sworn on 26th September 2014 supported the 1st protestor's mode of distribution. She explained that she gave her father Kshs. 500/= to purchase for her one acre piece of land in the year 1972 but the deceased did not do so. He wanted to refund her the money in 1992 but she declined. Therefore, the deceased decided to compensate her with one acre from his parcel No. Kiirua/ Ruiri/1729.

[6] The **3rd protestor**, Mary Gakii Joel in her affidavit of protest sworn on 18th August 2014 opposed the mode of distribution by the 1st protestor as she asserted that he and Ruth were already provided for. She also opposed her mother's mode of distribution regarding Land Parcel No. Kiirua/Ruiri/1951 because she has been given 0.272 Ha jointly with Charity Karegi and the petitioner which portion is small compared to the rest. That Charity Karegi's children, Alan Mwiti and Martin Mutahi were brought up by the deceased and petitioner and were each given one acre. Therefore Charity should take 0.2 Ha jointly with the petitioner. She proposes that the said parcel be distributed as follows:

1. Mary Gakii Joel - 0.372 Ha
2. Jenniffer Muthoni
Charity Karegi - 0. 2Ha
3. Alan Mwiti Joel - 0.4 Ha

[7] The **4th protestor**, Justa Muthoni Ngaku in her affidavit of protest sworn on 2nd December 2015 asserted that she is against the mode of distribution proposed by the petitioner as the name of her husband Phineas Ngaku has been omitted. That her husband was given 2 acres by Nchoroiboro Settlement Scheme title number Kiirua/Ruiru/1950. That parcel of land was not inherited from deceased but given to her late husband independently before he passed on in 2012. In the sixties, the deceased gave a portion of his estate where they built in 1967. In 1975 the petitioner started problems and chased them away from the deceased's estate. In 1998 the deceased gave her son Joel Muthomi Ngaku a plot in the estate in the presence of John Mbaabu and Robert Kimathi where he has put up a house. But when the deceased passed away the petitioner caused the house to be demolished.

[8] She agrees with the protests and their assertions apart from the proposed mode of distribution. She proposed that Martin Mutahi M'twaruchiu to get 0.0205Ha out of parcel No. Kiirua/Ruiru/1725 because parcel No. Kiirua/Ruri/1922 was sold by the deceased and proceeds used to educate him. She be entitled to the other 0.205 Ha of the said parcel of land. As for Kiirua/Ruiru/1951 be shared equally between Jennifer Muthoni, Mary Gakii, Farida Karegi Rama, Ruth Kathuni Odhiambo, Simon Gitobu and Allan Mwitii. For Allan Mwitii Joel to get 0.205 Ha from Parcel No Kiirua/Ruiru/1725 in adoption to his share above.

[9] The **5th protestor**, Joel Muthomi Ngaki in his affidavits sworn on 21st February 2017 and filed on 23rd May 2017 he stated that he is the son of the late Phineas Ngaku. He affirmed that before his father died he informed him that he was allocated parcel Kiirua/Ruiru/631 by Nchoroiboro Settlement Scheme which he was given by the government. He supported the assertions made by the 4th protestor that their family is entitled to 50x100ft given to them by the deceased.

[10] The petitioner avertedly refuted these assertions made by Joel in her replying affidavits of 18th April and 9th October 2017. She avowed that Joel requested the deceased to put up a temporary structure for his business next to the road. When he started ailing he requested Joel to remove his structure as he did not want an issue to arise of which he did and transferred it to Land parcel No. Kiirua/Ruiru/631 which was given to their father Phineas which was acquired by her and the deceased.

[11] This matter was heard *vide viva voce* evidence where all parties were heard by the court and canvassed by way of submissions of which this court has taken due account and consideration

[12] Accordingly, on 7th December 2015 all the parties were in agreement that the mode of distribution proposed by the petitioner in paragraph 5 (i) – (iv) of the affidavit in support for confirmation of grant dated 18th December 2013 be admitted. Parties provided seven issues of determination which have been collapsed into three, which are:

1. *Whether the 1st, 2nd and 4th protestor have been provided for*
2. *Should L.R. No. Kiirua/Ruiru/1725 which the Petitioner is seeking to give to Martin Mutai and which the 1st, 2nd and 3rd protestors are agreeable should be reduced to 0.20 HA as proposed by Justa Muthoni*
3. *How should land parcel No.Kiirua/Ruiru/1951 be distributed.*

[13] The first issue is whether the 1st, 2nd and 3rd protestors have been provided for. From the record it shows that the deceased had two wives:

(a) Esther Kagumo (deceased)

1. Simon Gitobu
2. Peter Nkanata - deceased survived by Charity Karambu
3. Phineas Ngaku - deceased survived by Justa Muthoni
4. Ruth Kathuni Odhiambo - Daughter

(b) Jennifer Muthoni

1. Farida Karegi Rama - Formerly known as Charity Karegi
2. Paul Muthuri - Son (deceased)
3. Jacob Kinoti - Son
4. John Mbaabu - Son
5. Mary Gakii - Daughter
6. Robert Kimani - Son

[14] Since the deceased was polygamous and he died intestate the governing law would be **Section 40 of the Law of Succession Act**

which states:

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

It promotes equality so as to ensure that each beneficiary gets what is rightly theirs and not more than what they are to be entitled. Thus, the importance of establishing whether the 1st, 2nd and 3rd protestor were provided for is based on this. This court has to take into consideration people who had already been gifted by the deceased so as to ensure that people do not get to benefit twice to the detriment of the others.

[15] The 1st protestor testified that he lives on L. R. No. Nkuene/Gathira/344 (0.53Ha) which belonged to his grandfather. His father was to inherit it but he decided to take it instead. 2nd protestor told the court that in 1972 he sent Kshs. 500 through her brother Phineous Ngaku so that he could buy her one acre of land. The deceased did not do so but compensated by giving her L. R. No. Kiirua/Ruiri/1729 measuring 1 Acre of which she sold. This was corroborated by the 1st and 4th protestor but the petitioner refuted this. The 2nd protestor did not produce any documentation to ascertain this.

[16] The 4th protestor and 5th protestor refuted that L. R. No. Kiirua/Ruiri/631 was given to their husband and father Phineous Ngaku by the deceased. They avowed that it was Phineous who bought the land. When they testified the 4th protestor stated that he found the deceased already with the land. The 5th protestor told the court that the land was obtained before he was born. Both protestors found Phineous with the said parcel of land before they came into the picture. Furthermore, if indeed Phineous obtained that land independently, why then has his brother and sister, 1st and 2nd protestor, excluded his family in their mode of distribution.

[17] The 5th protestor stated that he had been given a portion of 50 x 100 on plot No. 1951 by the deceased. His mother confirmed this of which the petitioner stated that was not the case for he was allowed to build a temporary structure. But when he started to build a permanent structure the deceased told him to demolish it. The protestors now want the plot given to them. Whoever alleges must prove and based on their evidence they have not proved. Consequently, I am of the view that the 1st, 2nd, 4th and 5th protestor have already been provided for.

[18] The second issue is should L.R. No. Kiirua/Ruiri/1725 which the petitioner is seeking to give to Martin Mutai and which the 1st, 2nd and 3rd protestors are agreeable should be reduced to 0.20 HA as proposed by Justa Muthoni. The reduction is because the deceased sold parcel No. Kiirua/Ruri/1922 for Martin’s education. For whatever purpose the deceased decided to sell his land it is not within the mandate of this court or any court to interfere with his free enjoyment to use his own property. This is because the deceased being the owner of the land had the right to do whatever he wished with it.

[19] It seems that all beneficiaries do not rebut that the deceased said that Alan Mwiti and Martin Mutai who are his grandchildren should get a share of the estate. It is not refuted that the deceased and petitioner raised and educated them and treated them as his own. They are fit the definition of defendant as defined under **Section 29 of CAP 160**. That is why I am of the view that indeed the deceased wished to give them one acre just like he has done for his own sons. Resultantly, I take the view that L.R. No. Kiirua/Ruiri/1725 which the petitioner is seeking to give to Martin Mutai should not be reduced.

[20] Lastly, how then should land parcel No. Kiirua/Ruiri/1951 be distributed. All the children of the deceased have been provided for apart from Mary Gakii and Charity Keregi as well as Alan Mwiti, the grandson. One of the underlying principles the **Law of Succession** has abided by under **Part V** is equality. Alan Mwiti and Martin Mutahi are both grandchildren of the deceased and sons of Charity Karegi daughter of the deceased. If she is given a share then it would mean that it would not be fair for the other persons since her house would be getting a larger share. As a result, I am of the opinion that Charity Karegi’s share to the estate has been catered for through her sons. Besides, she has not disputed to her sons getting a share of the estate.

[21] Accordingly, the grant is confirmed and the estate be distributed as follows:

- i. Land Parcel No. Kiirua/Ruiri/1723 (0.607 Ha) John Mbaabu M’Turuciu**
- ii. Land Parcel No. Kiirua/Ruiri/1724 (0.607 Ha) Jacob Kinoti Joel**
- iii. Land Parcel No. Kiirua/Ruiri/1727 (0.607 Ha) Robert Kimathi Joel**
- iv. Land Parcel No. Kiirua/Ruiri/1728 (0.607 Ha) Charity Karambu M’Nkanata alias M’Nkanatha**
- v. Land Parcel No. Kiirua/Ruiri/1725 (0.405Ha) Martin Mutai M’Twaruciu**
- vi. Land Parcel No. Kiirua/Ruiri/1951 (0.972Ha)**
 - a. Alan Mwiti Joel - 0.4 Ha

b. Mary Gakii Joel to share the balance Jennifer Muthoni equally.

Dated, signed and delivered in open court at Meru this 11th Day of February, 2019

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F. GIKONYO

JUDGE

In presence of

Kithinji for Mrs. Ntarangwi for petitioner

Chweya for objector – absent

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F. GIKONYO

JUDGE